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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J. A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a city, in order to remedy the virtual absence of minority participation in its city construction contracts caused by racial discrimination in its construction industry, may enact an ordinance that requires prime construction contractors to subcontract a portion of their city contracts to minority businesses.

2. Whether a city, in order to adopt a minority subcontracting requirement for city contracts, must admit or concede its own discrimination against minority contractors.

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JURISDICTIONAL STATEMENT

The City of Richmond, Virginia, appeals from the judgment of the United States Court of Appeals for the Fourth Circuit holding that the minority subcontracting requirement of a Richmond ordinance is unconstitutional as being violative of the equal protection clause of the fourteenth amendment.

OPINIONS BELOW

The opinion of the Fourth Circuit from which this appeal is taken is reported at 822 F.2d 1355 (4th Cir. 1987). It is reproduced as Appendix A in the Appendices attached to this Jurisdictional Statement. The or-

der of the Fourth Circuit denying the Petition for Rehearing with Suggestion for Rehearing En Banc is unreported and is reproduced as Appendix B. The earlier opinion of the Fourth Circuit, which was vacated by this Court, is reported at 779 F.2d 181 (4th Cir. 1985) and is reproduced as Appendix E in the Supplemental Appendices accompanying this Jurisdictional Statement. The decision of this Court granting certiorari, vacating the judgment of the Fourth Circuit, and remanding to the Fourth Circuit, is reported at 106 S. Ct. 3327 (1986) and is reproduced as Appendix D. The opinion of the district court is unreported and is reproduced as Appendix G in the Supplemental Appendices.

JURISDICTION

The judgment of the Fourth Circuit declaring the Richmond ordinance unconstitutional and remanding to the district court for determination of appropriate relief was issued on July 9, 1987 (App. A). A petition for rehearing with suggestion for rehearing en banc, filed on July 23, was denied on September 18, 1987, by a vote of 6-5 (App. B). A notice of appeal to this Court was filed with the Fourth Circuit on November 18, 1987 (App. C).

This appeal is being docketed within 90 days of the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2) (1982).

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

This appeal involves (1) the equal protection clause of the fourteenth amendment to the United States Constitution, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws," and (2) the Richmond, Virginia Minority Business Utilization Plan, codified at Richmond, Va. Code ch. 24.1, art. I(F) (Part B) ¶ 27.10-27.20, art. VIII-A

(1983). The Minority Business Utilization Plan is reproduced as Appendix H in the Supplemental Appendices accompanying this Jurisdictional Statement.

STATEMENT OF THE CASE

The United States Congress and this Court have recognized that racial discrimination in the construction industry, and its impact on public contracting opportunities for minorities, is a problem of national proportions.[1] Like many other local governments across the country, the City of Richmond, Virginia, sought to remedy racial discrimination in its own local construction industry that had severely limited minority participation in its public construction contracts. It enacted a minority subcontracting plan for city construction contracts similar to the federal plan approved by this Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The Fourth Circuit, claiming reliance on *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842 (1986), declared the Richmond plan unconstitutional.

A. The Minority Business Utilization Plan

In 1983, one-half of the population of Richmond was minority, primarily black.[2] In the five years prior to 1983, less than one percent—practically none—of the City's $124 million in construction contracts was awarded to minority-owned businesses.[3] An ordinance to address this problem was drafted, and in April 1983, the Rich-

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[1] *See Fullilove v. Klutznick*, 448 U.S. 448 (1980).

[2] Hearing on Adoption of Minority Business Utilization Plan, Richmond City Council 3 (1983) (hereinafter "Hearing Transcript"). The transcript of the City Council's public hearing is part of the record in this case. A copy has been lodged with the Clerk's office for the Court's convenience.

[3] Of the $124 million in city construction contracts, 0.67 percent was awarded to minority businesses during this period. *Id.* at 46, 49. *See also* App. G at 115.

mond City Council held a public hearing on this ordinance. It heard testimony and other evidence that racial discrimination had limited minority participation in Richmond's construction industry and effectively had excluded minority participation in city construction contracts. Witnesses spoke for and against the ordinance in a vigorous debate.[4]

In addition to evidence about the insignificant minority participation in Richmond's public construction contracts, the City Council heard evidence that the major construction trade associations in the City contained virtually no black members. The Associated General Contractors of Virginia had 600 members, including 130 in Richmond, but no blacks;[5] the American Subcontractors Association had 80 members in the Richmond area but no blacks;[6] the Richmond chapter of the Professional Contractors Estimators Association had 60 members but only one black;[7] the Central Virginia Electrical Contractors Association had 45 members but only one black;[8] and the Virginia Chapter of the National Electrical Contractors Association had 81 members but only two blacks.[9]

As the City Council knew, Congress had enacted a federal set-aside plan to remedy widespread racial discrimination that had limited minority participation in public contracting at the federal, state, and local level, and this federal plan had been held constitutional in *Fullilove*.[10] In addition, one member of the City Council,

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[4] *See* App. A at 16a (Sprouse, J., dissenting).

[5] Hearing transcript at 25-26.

[6] *Id.* at 39.

[7] *Id.* at 44.

[8] *Id.*

[9] *Id.* at 36-37.

[10] *Id.* at 8-9.

a former Mayor of Richmond, drew on his own experience with the Richmond construction industry in declaring, "without equivocation," that widespread racial discrimination in that industry had limited minority participation in Richmond's public construction contracts.[11]

At the end of the public hearing, the City Council enacted the Minority Business Utilization Plan.[12] The plan required contractors to whom the City awarded prime contracts to subcontract at least thirty percent of the dollar amount of the contract to minority business enterprises (MBEs), unless the prime contractor was itself an MBE or the City waived the requirement.[13] Waivers would be granted by the City on a showing that the contractor had attempted to comply with the plan's requirement but that "sufficient, relevant, qualified" MBEs were unavailable or unwilling to participate. App. G at 116-17. So that the plan would not outlive its limited remedial purpose, it was designed to expire by its own terms on June 30, 1988. App. H at 248.

B. The plan applied to Croson

Five months after the Richmond plan was enacted, the City invited bids for the installation of plumbing fixtures at the city jail. The J.A. Croson Company ("Croson"), which is not an MBE, was interested in bidding on the

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[11] *Id.* at 46 (remarks of Henry Marsh).

[12] Richmond, Va. Code ch. 24.1, art. I(F)(Part B) ¶ 27.10-27.20 (1983). The plan was actually enacted pursuant to two ordinances. *See* App. H.

[13] The plan defined an MBE as "[a] business at least fifty-one percent of which is owned and controlled, or fifty-one percent minority owned and operated, by minority group members . . . ." App. H at 251. "Minority group members" were defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." App. H at 252. Procedures promulgated pursuant to the plan required city officials to verify that an MBE was in fact minority-owned and controlled, so that "sham" MBEs did not benefit from the plan. App. E at 62.

contract and sought an MBE subcontractor to participate in the bid. On the day the bids were due, it contacted Continental Metal Hose ("Continental"), an MBE.[14] Though Continental was unable to state a firm price to Croson because it could not get an immediate commitment from its suppliers, it did indicate to Croson a desire to participate in Croson's bid. App. G at 122-23. Despite the lack of a firm commitment on price, Croson submitted a bid to the City, which was accepted. *Id.* at 123.

Shortly after the award, Croson requested a waiver of the MBE requirement on the ground that Continental had not quoted a firm price. The City refused to grant a waiver. App. G at 124-26. When Croson learned that Continental's firm price was higher than Croson had hoped, it again requested a waiver, or, alternatively, an increase in the contract price. Instead, the City elected to re-open the project for bids and invited Croson to submit a new bid. *Id.* at 126-28. Rather than submit a new bid, Croson brought this lawsuit.[15]

C. The proceedings below

Croson claimed that the Minority Business Utilization Plan violated the equal protection clause of the fourteenth amendment and Virginia state law, and it sought an injunction, declaratory relief, and damages. After a bench trial, the district court held for Richmond on all claims.[16]

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[14] There is dispute as to whether Croson had contacted Continental prior to that time. *See* App. G at 121-22.

[15] The suit was brought in Virginia state court and removed to the United States District Court for the Eastern District of Virginia.

[16] *J.A. Croson Company v. City of Richmond*, No. 84-0021-R (E.D. Va. Dec. 3, 1984) (App. G). Croson also raised federal statutory claims based on 42 U.S.C. §§ 1981 and 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. However, Croson agreed that these claims had no basis in the absence of a valid

After finding the Richmond plan permissible under Virginia law, the district court considered Croson's equal protection claim. App. G at 155. Since the appropriate standard for review of race-based remedial programs had been left unresolved by *Fullilove* and *Regents of the University of California v. Bakke*,[17] the district court relied on a three-part test synthesized from *Fullilove* and *Bakke* by the Eleventh Circuit:

> (1) that the governmental body have the authority to pass such legislation; (2) that adequate findings have been made to ensure that the governmental body is remedying the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another; and (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination.[18]

The district court determined that the Richmond plan satisfied all elements of this test.[19]

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equal protection claim, App. G at 222-23, and it did not raise them on appeal.

[17] 438 U.S. 265 (1978).

[18] App. G at 161-62 (quoting *South Florida Chapter of Associated General Contractors of America v. Metropolitan Dade County, Fla.*, 723 F.2d 846, 851-52 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984) (emphasis omitted)).

[19] App. G at 162-209. In particular, the court found sufficient evidence to conclude racial discrimination was responsible for the virtual absence of minority participation in Richmond's public construction contracts. The court noted (1) the "enormous disparities" between the percentage of city construction contracts awarded to minority businesses and the percentage of minorities in the Richmond population; (2) prior findings of the United States Congress that low levels of minority business participation in public contracting reflect past discrimination; and (3) testimony at the City Council hearing that there was racial discrimination in Richmond's construction industry. The court rejected the argument that the low minority participation in public construction contracts reflected only the small number of minority contractors in Richmond, reason-

On appeal, the Fourth Circuit affirmed the district court's decision.[20] The Fourth Circuit found the district court had correctly applied a proper test in evaluating Croson's equal protection claim.

Croson sought certiorari from this Court, which granted the writ, summarily vacated the judgment, and remanded the case for consideration in light of *Wygant*.[21] On remand, and without briefing or argument concerning the impact of *Wygant*, the original panel of the Fourth Circuit reversed itself and found the Richmond plan unconstitutional, Judge Wilkinson writing for a divided court over a dissent from Judge Sprouse.[22]

Citing the plurality opinion in *Wygant*, the majority held that Richmond was obligated to show a "compelling interest" in its remedial plan, and that this required a showing that the City itself actively had discriminated against minority contractors. App. A at 5a, 8a. It considered the hearing testimony "nearly weightless," *id.* at 8a, and it found insignificant the fact that a city with a minority population of fifty percent awarded less than one percent of its public construction contracts to minority contractors. *Id.* at 7a. The majority concluded that the Richmond plan was a remedy for "societal discrimination" rather than discrimination by the City itself, and that it was therefore unconstitutional under

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ing that the small number of minority contractors in Richmond "suggests . . . that past discrimination has stymied minority entry into the construction industry in general, as well as participation in government construction contracting in particular." App. G at 163-68.

[20] *J.A. Croson Co. v. City of Richmond*, 779 F.2d 181 (4th Cir. 1985) (App. E).

[21] *J.A. Croson Co. v. City of Richmond*, 106 S. Ct. 3327 (1986) (App. D).

[22] *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987) (App. A).

Wygant. *Id.* at 8a-9a. It also held, in the alternative, that the Richmond plan was not sufficiently "narrowly tailored" to meet its remedial goal. *Id.* at 11a.

The dissent argued that the majority "misconstrues and misapplies *Wygant*." App. A at 14a. Requiring a showing of active governmental discrimination against minority contractors, "might be fatally counterproductive to the concept of affirmative action," it stated, *id.* at 20a, and is in any event inappropriate "in areas where discrimination had effectively prohibited the entry of minorities into the contracting business, as in Richmond." *Id.* n.11. In the dissent's view, the City had sufficient evidence of past discrimination against minorities in its local construction industry, and the plan was sufficiently "narrowly tailored," to pass constitutional muster under *Wygant*. *Id.* at 15a.

The City then filed a petition for rehearing and suggestion for rehearing en banc. The Fourth Circuit denied the petition by a vote of six to five.[23]

THE QUESTIONS ARE SUBSTANTIAL

This case presents substantial and important issues, not yet resolved by this Court, concerning the circumstances under which a city may act to remedy racial discrimination in the city's construction industry that has prevented minorities from competing for city construction contracts. The Fourth Circuit, citing this Court's decision in *Wygant*, severely crippled the ability of cities effectively to remedy this discrimination. Other federal courts of appeal, also purporting to rely on *Wygant*, have reached similar results.[24] As a conse-

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[23] Order, *J.A. Croson Co. v. City of Richmond*, No. 85-1002(L), No. 85-1041 (4th Cir. Sept. 18, 1987) (App. B).

[24] *See Michigan Road Builders Association v. Milliken*, No. 86-1239 (6th Cir. Nov. 25, 1987); *Associated General Contractors*,

quence, programs instituted by many other state and local governments are directly endangered.[25] This is a matter of national importance and one that should not be left to unguided courts of appeal. This Court should resolve this matter after plenary review.

I. THE FOURTH CIRCUIT'S INTERPRETATION OF *WYGANT* THREATENS THE VIABILITY OF MINORITY CONTRACTING PROGRAMS ACROSS THE COUNTRY

The City of Richmond's Minority Business Utilization Plan represents one city's effort to deal with its share of a national problem in the only way that it reasonably could.

The United States Congress attempted to deal with the same problem when it enacted the "minority business enterprise" provision of the Public Works Employment Act of 1977.[26] Congress had found that racial discrimination in the construction and related industries had impaired the opportunities for minorities to participate in government contracting at the federal, state, and local level.[27] In *Fullilove*, this Court upheld the constitu-

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v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987) (petition for rehearing pending); *J. Edinger & Son v. City of Louisville*, 802 F.2d 213 (6th Cir. 1986).

[25] The United States Conference of Mayors and the United States Department of Commerce recently studied cities with populations between 30,000 and 350,000 and determined that minority business assistance efforts were ongoing in 120 out of the 320 cities that had responded to questionnaires. United States Conference of Mayors and United States Department of Commerce, *1986 National City Profiles: Report on Minority Enterprise Development Programs* 1 (1986).

[26] 42 U.S.C. § 6705(f)(2) (1982).

[27] On a closely related issue, this Court has stated that "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial

tionality of Congress' attempt to deal with the minority contractor problem. The Court found the federal plan justified by "abundant evidence . . . that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." [28]

Like the federal government, state and local governments expend substantial resources each year on construction contracts. In response to the very problem identified and addressed by Congress, many state and local governments across the country have enacted assistance programs for minority contractors.

In enacting its plan, Richmond was responding to dramatic evidence that minority businesses had been virtually excluded from participation in the City's construction contracts as a direct result of discrimination in Richmond's construction industry. The disparity between the percentage of city construction business going to minorities in Richmond—less than one percent—and the percentage of minorities in Richmond—fifty percent—was so clearly probative that by itself it strongly indicates that discrimination had been at work.[29] In combi-

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notice." *United Steelworkers of America v. Weber*, 443 U.S. 193, 198 n.1 (1979).

[28] *Fullilove*, 448 U.S. at 477-78 (plurality opinion).

[29] Richmond had confronted in its recent past the need to break down racial barriers in various other segments of its society and in the city government itself. *See, e.g., City of Richmond v. United States*, 422 U.S. 358 (1975) (concerning the City's annexation plan and its compliance with the Voting Rights Act); *Bradley v. School Board*, 462 F.2d 1058, 1065 (4th Cir. 1972) (en banc) (school desegregation case, finding that "within the city of Richmond there has been state . . . action tending to perpetuate apartheid of the races"), *aff'd by an equally divided Court*, 412 U.S. 92 (1973) (per curiam). "No race-conscious provision that purports to serve a remedial purpose can be fairly assessed in a vacuum." *Wygant*, 106 S. Ct. at 1858 (Marshall, J., dissenting).

nation with Congress' findings of a long history of racial discrimination in state and local construction contracting,[30] and the other evidence adduced at its public hearing,[31] the City had a firm basis to believe that racial discrimination effectively had shut minorities out of Richmond's construction industry, and thus out of its public construction contracts.

The City had been a passive participant in the discrimination that had erected a remarkably effective barrier to minority participation in its construction contracts. For years it had perpetuated the effects of that discrimination by continuing to award valuable city contracts to a pool of contractors from which minorities had been virtually excluded. In 1983, Richmond decided to discontinue that role. Instead it began to create opportunities for minority entrepreneurs that previously had been denied to them because of racial discrimination. The City's actions were responsible and reasonable.

After *Fullilove*, efforts like those of Richmond here were upheld by each of the three federal appeals courts in which they were challenged.[32] Since the Court decided *Wygant*, however, the three federal courts of appeal that have considered the constitutionality of state or local

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[30] *See Fullilove*, 448 U.S. at 478. The Fourth Circuit dismissed the importance of Congress' findings, stating that "[n]ational findings do not alone establish the need for action in a particular locality." App. A at 9a. However, the City was entitled to rely on Congress' findings as long as it reasonably believed them to be relevant to the problem that it was addressing. *See City of Renton v. Playtime Theatres*, 475 U.S. 41, 50-52 (1986).

[31] *See supra* pages 4-5.

[32] *See South Florida Chapter of Associated General Contractors of America v. Metropolitan Dade County, Fla.*, 723 F.2d 846 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984); *Ohio Contractors Association v. Keip*, 713 F.2d 167 (6th Cir. 1983); *Schmidt v. Oakland Unified School District*, 662 F.2d 550 (9th Cir. 1981), *vacated on other grounds*, 457 U.S. 594 (1982).

minority contracting programs have struck them down.[33] The Fourth Circuit's reversal of its own position in this case exemplifies this turnaround.

Moreover, the manner in which the lower courts are interpreting *Wygant* does not, as a practical matter, permit a state or local government to demonstrate any "compelling interest" in a minority contracting program. The approach of the Fourth Circuit here illustrates this point. The Fourth Circuit, relying on *Wygant*, concluded that Richmond did not have a "compelling interest" in its remedial plan because there was insufficient evidence that the City itself had engaged in the discrimination that it sought to remedy. App. A at 8a-9a. Even assuming the "compelling interest" standard is appropriate,[34] the Fourth Circuit's interpretation of *Wygant* makes unreasonable demands on a state or local government that wishes to remedy past discrimination by providing equal opportunities to minority members of its business community.

To require a government to admit or concede its own discrimination obviously would undermine its incentives to take remedial action.[35] Moreover, since longstand-

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[33] *See supra* note 24.

[34] Members of this Court variously have stated that the government's interest in its remedial program must be "important" or "compelling" if it is to survive scrutiny under the equal protection clause. *See United States v. Paradise*, 107 S. Ct. 1053, 1064 n.17 (1987).

[35] *See Wygant*, 106 S. Ct. at 1855 (O'Connor, J., concurring in part and concurring in judgment). The City Council in fact was very concerned that its enactment of a remedial plan not be construed as an admission of liability for past discrimination. When one Council member expressed concern that characterizing the plan as "remedial" might give rise to liability, the City's attorney responded:

> In the term remedial, we're not just implying that the City was intentionally discriminatory in the past. What we're say-

ing race-based barriers to entry have prevented minorities from even competing for government contracts,[36] proving active governmental discrimination in the public contracting setting usually will be futile and beside the point.[37] The Fourth Circuit stated that the appropriate way to prove past discrimination is through a comparison of "the number of minority contracts and the number of minority *contractors*, taking into account other relevant variables such as experience and specialities."[38] This test is impossible to satisfy where, as in this case, discrimination has prevented minorities from participating significantly in the pool from which contractors would be drawn. The Fourth Circuit's approach will serve only to perpetuate discrimination that has been so effective as to deny minorities even the opportunity to compete for government contracts.

> ing is that there are statistics about the number of minorities which were awarded contracts in the past which would justify the remedial aspects of the legislation. We're not saying there was intentional discrimination in any particular case.

Hearing Transcript at 8.

[36] *See Fullilove*, 448 U.S. at 478.

[37] In *Fullilove*, the minority set-aside plan was held constitutional on evidence showing that government had been in effect a passive participant in "the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct." *Fullilove*, 448 U.S. at 478.

[38] App. A at 7a (emphasis in original). It also rejected the City's use of general population statistics as "exactly the kind of evidence that will not pass muster," *id.*, reasoning that a "similar comparison" had been rejected by the plurality in *Wygant*. *Id.* It failed to appreciate that the comparison at issue in *Wygant* was rejected only because it was not probative of the issue of discrimination. As Justice Powell explained in *Wygant*, "[t]here are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind." *Wygant*, 106 S. Ct. at 1848 (plurality opinion).

II. THE FOURTH CIRCUIT'S CONSTITUTIONAL ANALYSIS OF THE RICHMOND PLAN WAS MORE STRINGENT THAN *WYGANT* REQUIRES

The Fourth Circuit's constitutional analysis of the Richmond plan was far more stringent than anything contemplated by this Court in *Wygant* or any other decision. *Wygant* involved issues very different from those presented in this case.[39]

Whether Richmond's plan is supported by a compelling or important interest—the critical question in this case—turns on issues not resolved by *Wygant*. In *Wygant*, the court of appeals had upheld a race-conscious layoff provision on the theory that a school board had an interest in providing minority role models for its minority students in order to alleviate the effects of societal discrimination. A plurality of this Court rejected the court of appeals' approach, reasoning that:

> [s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies

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[39] There obviously is strong disagreement about the meaning of *Wygant* and its application to the government contracting setting. In this case, not only was there a vigorous dissent from Judge Sprouse, but five of the eleven judges of the Fourth Circuit voted for a rehearing en banc. In *Michigan Road Builders Association v. Milliken*, No. 86-1239 (6th Cir. Nov. 25, 1987) in which the majority relied on both *Wygant* and the instant case in declaring a Michigan minority contractor set aside program unconstitutional, the dissent's opening remark was: "The majority reads *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), as if it changed all the previously accepted standards for judging the validity of affirmative action programs of governments and governmental units. That is not a fair appraisal of the purport or effect of *Wygant*." Slip op. at 28.

> that work against innocent people, societal discrimination is insufficient and over expansive.[40]

The plurality also indicated that this Court had in the past "insisted upon some showing of prior discrimination by the governmental unit involved." [41]

However, because this Court found the layoff provision to be unconstitutional in any event, it never explored the question of what constitutes "societal discrimination," [42] or whether governmental participation in prior discrimination is required in all cases to support a voluntary affirmative action program,[43] or, where governmental participation is required, the kind or degree of participation required. Moreover, this Court did not consider "governmental interest" issues in the public contracting context at all. Indeed, as Justice O'Connor pointed out in her concurring opinion:

> [C]ertainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or

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[40] *Wygant*, 106 S. Ct. at 1848 (emphasis in original).

[41] *Id.* at 1847.

[42] Justice O'Connor did indicate that "societal discrimination" is "discrimination not traceable to [a governmental agency's] own actions." *Wygant*, 106 S. Ct. at 1854. (O'Connor, J., concurring in part and concurring in judgment).

[43] A showing of prior governmental discrimination is not necessary where a voluntary affirmative action program is challenged under Title VII of the Civil Rights Act of 1964. *See Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442, 1451 (1987). It is sufficient for the employer to show a "conspicuous . . . imbalance in traditionally segregated job categories." *Id.* (quoting *United Steelworkers of America v. Weber*, 443 U.S. 193, 209 (1979) (Blackmun, J., concurring)).

> 'compelling' to sustain the use of affirmative action policies.[44]

The Fourth Circuit thus erred in concluding that *Wygant* required Richmond to show that the City itself actively had discriminated against minority contractors.

Wygant held that "societal discrimination, without more" will not support a government's use of race-conscious measures.[45] This requirement is met here whether or not the City actively discriminated against minorities in the awarding of city construction contracts. The City Council was not attempting to remedy the effects of "societal discrimination," but rather was addressing a specific problem that concerned the conduct of city business and that it determined to be a direct result of racial discrimination in a local industry, the effects of which the City was perpetuating. As Judge Sprouse stated in his dissent from the Fourth Circuit opinion:

> [T]here was no suggestion before the Council that the Richmond business community needed a 'role model' in the form of highly visible minority contractors performing public work, or even that the minimal presence of minority contractors in that endeavor was caused by such 'societal' discrimina-

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[44] *Wygant*, 106 S. Ct. at 1853. (O'Connor, J., concurring in part and concurring in judgment). *See also id.* at 1867 (Stevens, J., dissenting) (layoff provision justified by school board's interest in employing minority teachers regardless of whether school board itself was guilty of racial discrimination); Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv. L. Rev. 78 (1986) (arguing that voluntary affirmative action plans may be justified by a variety of goals other than remedying the past discrimination of the entity adopting the plan).

[45] *See Wygant*, 106 S. Ct. at 1848 (plurality opinion). As Justice Powell stated in *Wygant*, if a remedial plan were designed to correct societal discrimination, "a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Id.*

> tory factors as past inferior education or lack of access to social institutions.

App. A at 21a-22a. The governmental interest here is fundamentally different from that found insufficient to support the remedial plan in *Wygant*.

The Fourth Circuit also misapplied *Wygant* in holding that the Richmond plan was not sufficiently "narrowly tailored" to meet its remedial goal.[46] Its primary argument was that "[t]he thirty percent quota was chosen arbitrarily; it was not tied, for example, to a showing that thirty percent of Richmond subcontractors are minority-owned." App. A at 11a. To a large extent, this position flows from the court's erroneous view of the "compelling interest" issue. As discussed *infra* at 14, the Fourth Circuit failed to recognize that tying a minority subcontracting requirement to the percentage of local minority-owned contractors is inappropriate where that percentage is low as a result of discrimination. Moreover, its assertion that the thirty percent figure is arbitrary is unfair. As this Court has recognized, arriving at such a figure "necessarily involve[d] a degree of approximation and imprecision."[47] In view of the virtual absence of minority participation in city contracts in a city fifty percent minority, the thirty percent figure is reasonable.

The reasonableness of the Richmond plan is strengthened by the fact that it contains waiver provisions and an expiration date, both of which this Court has recognized narrow the scope of an affirmative action plan's

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[46] It is clear that a government must use appropriate means to achieve its remedial goals. The "narrowly tailored" standard is one of several standards enunciated by members of this Court at various times, and arguably the strictest. *See United States v. Paradise*, 107 S. Ct. 1053, 1064 n.17 (1987). Even assuming it is the governing standard, it is satisfied in this case.

[47] *United States v. Paradise*, 107 S. Ct. at 1072 (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 372 (1977)).

operation and minimize its impact on non-minorities.[48] The Fourth Circuit nevertheless found the waiver provisions too "restrictive" because a waiver may be granted "only in exceptional circumstances" (precisely the same language approved in *Fullilove*) and as a matter of administrative discretion, and because the burden of obtaining the waiver is on the contractor seeking it. App. A at 12a-13a. These are truly surprising criticisms, since not only are the waiver provisions modeled after those approved by this Court in *Fullilove*, but they contain standard terms one would expect to find in any waiver provision. Similarly, the Fourth Circuit gave no weight to the Richmond plan's expiration date, on the ground it does not preclude the City from renewing the plan. *Id.* at 12a. This, of course, is true of any expiration date. Given the nature of these criticisms, it is apparent that the Fourth Circuit's interpretation of the "narrowly tailored" requirement is far more stringent than anything contemplated by this Court, and should not be left standing.

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[48] *United States v. Paradise*, 107 S. Ct. at 1067; *Fullilove*, 448 U.S. at 510-11 (Powell, J., concurring).

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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December 17, 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 85-1002, 85-1041

J.A. CROSON COMPANY,
Appellant,

v.

CITY OF RICHMOND,
Appellee,

ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Amicus Curiae.

J.A. CROSON COMPANY,
Appellee,

v.

CITY OF RICHMOND,
Appellant,

ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Amicus Curiae.

July 9, 1987

Rehearing and Rehearing En Banc
Denied Sept. 18, 1987

Before HALL, SPROUSE, and WILKINSON, Circuit Judges.

WILKINSON, Circuit Judge:

This case is now before us on remand from the Supreme Court. It involves a challenge to the Minority Business Utilization Plan enacted by the City Council of Richmond, Virginia. The plan requires contractors on city construction projects to subcontract at least thirty percent of the dollar value of the contract to minority-owned business enterprises (MBE's) unless the city waives the requirement. This court earlier upheld the plan under Virginia law and the federal Constitution.

The Supreme Court granted certiorari, vacated the judgment, and remanded the case for consideration in light of *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). We now hold that the Richmond plan is invalid under the Equal Protection Clause of the Fourteenth Amendment.

I.

The Minority Business Utilization Plan, enacted in April of 1983, sets aside part of the city's construction expenditures for minority-owned businesses. The plan terminates in 1988, at which time the City Council can renew it or allow it to lapse. Under the plan, the prime contractor must subcontract at least thirty percent of the dollar value of the contract to firms that are at least one-half minority owned. Every construction contract includes provisions setting out the MBE requirement and the procedures for complying with it. The contract provisions state that if a contractor fails to meet the MBE requirement, the contract "shall be suspended or terminated unless a waiver is granted." They further state that the city will not waive the requirement "other than in exceptional circumstances." Only non-minority prime contractors must comply with the plan provisions.

In September of 1983, the city invited bids for the installation of stainless steel urinals and water closets at the City Jail. The J.A. Croson Co., which is not itself an

MBE, was the only bidder on the contract. After Croson submitted its bid for the project, it requested a waiver of the MBE requirement. Croson contended that it was unable to locate any minority subcontractors, except one that it considered unqualified. The city refused to grant a waiver. Croson then informed the city that if it were required to use the unqualified contractor, the cost of the project would rise by $7,663.16, and the contract price would have to rise accordingly. The city again turned Croson down, stating that the minority contractor was qualified and that the fixed price bid could not be increased.

Shortly thereafter, the city informed Croson that it had decided to re-bid the project. Croson was invited to submit a new bid. Croson then sued in federal district court, arguing that the plan's racial set-aside was contrary to Virginia law governing competitive bid procedures and that it violated the federal Constitution. Croson brought its federal claims under 42 U.S.C. §§ 1981 and 1983.

The district court ruled that the plan was consistent with both Virginia law and federal law. A divided panel of this court affirmed. *J.A. Croson Co. v. City of Richmond*, 779 F.2d 181 (4th Cir. 1985). After this court announced its decision, the Supreme Court decided *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). The Supreme Court granted certiorari in the *Croson* case and remanded it to us for further consideration in light of *Wygant*. *See* —— U.S. ——, 106 S.Ct. 3327, 92 L.Ed.2d 733 (1986).

Wygant involved a challenge to a preferential layoff provision in a collective bargaining agreement for school teachers. The agreement stated that if the Board of Education needed to lay off any teachers, those with the most seniority would be protected, "except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff." 106 S.Ct. at 1845. The

Court held this provision unconstitutional, principally because the racial preference was not justified by adequate findings of prior discrimination and because it was not narrowly tailored to its asserted remedial purpose.

After reconsidering our decision in light of *Wygant*, we conclude that we must invalidate the racial preference in the Richmond plan. The very infirmities which marked the preferential provision in *Wygant* are present in this case.

II.

Because the views of the majority in *Wygant* were expressed in a plurality opinion and two concurrences, the boundaries of *Wygant* will no doubt be a matter of dispute.[1] There should be no dispute, however, about the core of its holding: To show that a plan is justified by a compelling governmental interest, a municipality that wishes to employ a racial preference cannot rest on broad-brush assumptions of historical discrimination. Yet that is exactly what the Richmond City Council did in this case. If this plan is held to be valid, then local governments will be free to adopt sweeping racial preferences at their pleasure, whether those preferences are legitimate remedial measures or bald dispensations of public funds and employment based on the politics of race. It is precisely to guard against this latter abuse

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[1] Unless otherwise noted, the references to *Wygant* herein refer to the plurality opinion. The plurality opinion of Justice Powell was joined by Chief Justice Burger and Justice Rehnquist; it was also joined in part by Justice O'Connor, who wrote separately. Justice White concurred in the judgment and wrote separately.

Our analysis of the Richmond plan comports, we believe, with the views expressed in all three opinions. Although Justice White did not elaborate in *Wygant* on the requirements of particularized findings and narrowly tailored means, he certainly did not indicate that he would permit localities greater latitude in this regard than Justices Powell and O'Connor. Of critical importance is the fact that five Justices concurred in the judgment that the racial preference in *Wygant* was unconstitutional.

that the *Wygant* requirement of particularized findings is essential.

A.

According to the *Wygant* plurality, before an asserted governmental interest in a racial preference can be accepted as "compelling," there must be findings of prior discrimination. Findings of *societal* discrimination will not suffice; the findings must concern "prior discrimination *by the government unit involved*" (emphasis added). *Wygant*, 106 S.Ct. at 1847. Moreover, if this finding is to be drawn from mere statistical evidence, that evidence cannot just show a disparity between the percentage of minorities in some activity (e.g., employment in public schools or awarding of public contracts) and the percentage of minorities in the community. It must instead focus on the population that is relevent for comparative purposes, such as the percentage of minorities in the local labor force or the construction business. *Id.* at 1847-48; *see also Johnson v. Transportation Agency, Santa Clara County*, —— U.S. ——, 107 S.Ct. 1442, 1452, 94 L.Ed. 2d 615 (1987); *Hazelwood School District v. United States*, 433 U.S. 299, 308 & n. 13, 97 S.Ct. 2736, 2742 & n. 13, 53 L.Ed.2d 768 (1977).[2]

The Supreme Court in *United States v. Paradise*, —— U.S. ——, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) and *Local 28 of Sheet Metal Workers v. EEOC*, —— U.S. ——, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986), reemphasized this need for a suitable basis for remedial action. In both of these cases, the Court upheld race-conscious relief imposed by district courts where the offending in-

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[2] The Supreme Court's decision in *Johnson, supra*, does not alter *Wygant*'s requirement of a showing of prior discrimination. The *Johnson* Court addressed only a Title VII claim, not a Fourteenth Amendment claim such as the one now before us. The Court stated that if a Fourteenth Amendment claim were before it in *Johnson*, the *Wygant* standard would come into play. 107 S.Ct. at 1446 n. 2; *id.* at 1449-50 n. 6.

stitutions had a history of discriminatory conduct. In *Paradise*, for example, the Court reviewed that institutional history in painstaking detail, noted the "four decades" during which blacks had suffered total exclusion from all positions in the Alabama Department of Public Safety, and concluded that the "pervasive, systematic, and obstinate discriminatory conduct of the Department" justified the race-conscious relief ordered by the district court. 107 S.Ct. at 1065 (opinion of Brennan, J.). While *Wygant* involved voluntary action and *Paradise* and *Sheet Metal Workers* involved court-ordered remedies, there was in all those cases a substantial basis for believing that remedial action was required.

Here, by contrast, proceedings before the City Council failed to establish the basis for remedial action. The debate, at the very end of a five-hour council meeting, revealed no record of prior discrimination by the city in awarding public contracts, aside from some conclusory and highly general statements made by a member of the public, a City Council member who supported the plan, and the City Manager. The member of the public who testified about discrimination was not even involved in the construction industry. The City Manager's comments mainly had to do with the city of Pittsburgh. Such meager evidence is not a sufficient finding of prior discrimination. The proceedings betray the very casualness about the use of racial distinctions in public enactments that *Wygant* warned against.

The only other evidence purporting to show discrimination in the assignment of contracts compared the percentage of minority contracts with the total number of minority residents in the community. Statistical records were said to indicate that minorities comprised 50% of Richmond's population but that minority-owned firms had received only 0.67% of the dollar value of Richmond's prime contracts. General population statistics suggest, if anything, more of a political than a remedial basis for

the racial preference. According to the plurality in *Wygant*, this is exactly the kind of evidence that will not pass muster.

The appropriate comparison is between the number of minority contracts and the number of minority *contractors*, taking into account other relevant variables such as experience and specialties. Showing that a small fraction of city contracts went to minority firms, therefore, does not itself demonstrate discrimination; both sides agree that the number of minority-owned contractors in Richmond was also quite small. *Wygant* rejected a similar comparison in an employment context:

> There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind. In fact, there is no apparent connection between the two groups. Nevertheless, the District Court combined irrelevant comparisons between these two groups with an indisputable statement that there has been societal discrimination, and upheld state action predicated upon racial classifications.

106 S.Ct. at 1838.

Our holding today is likewise consistent with that of the Sixth Circuit in *J. Edinger & Son, Inc. v. City of Louisville*, 802 F.2d 213 (6th Cir.1986). In *Edinger*, the city of Louisville enacted a program to grant preferential treatment to racial minorities, women, and the handicapped in awarding its supply and service contracts. There, as in the present case, the need for the program was justified principally by general population statistics. Because general population statistics failed to address the "statistical disparity between the percentage of qualified minority business contractors doing business in Jefferson County and the percentage of bid funds awarded to those businesses," the Sixth Circuit found that the program did

not comport with *Wygant*. 802 F.2d at 216. *Accord Associated General Contractors of California v. San Francisco*, 813 F.2d 922 (9th Cir. 1987).

We do not suggest that the City Council should be held to as high a standard in its factfinding as, say, a federal district court. Justice O'Connor, in her concurrence in *Wygant*, identified the problems with requiring an extended *mea culpa* from localities seeking to eliminate a historical pattern of discriminatory practice. Legislative findings are, moreover, different from judicial ones; the City Council need not have produced formal, contemporaneous findings, so long as it had "a firm basis for believing that remedial action is required." *Wygant*, 106 S.Ct. at 1853 (O'Connor, J., concurring in part and concurring in the judgment).

In this case, however, the city has failed to show such a firm basis, either contemporaneously or at the district court level. The able trial judge could not point to any evidence beyond that relied upon by the City Council—namely, the spurious statistical comparison and the nearly weightless testimony. We cannot uphold the plan based on this evidence, nor would it be proper for us to develop a *post hoc* rationale for the city's racial preference.

In sum, the omissions in this case overshadow the evidence. There has been no showing that qualified minority contractors who submitted low bids were passed over. There has been no showing that minority firms were excluded from the bidding pool. *Edinger*, 802 F.2d at 216. There has been no showing—only the loosest sort of inferences—of past discrimination, without which *Wygant* does not permit a racial preference to stand.

The record in this case suggests that the City Council thought it was permissible simply to adopt the contract set-aside program upheld by the Supreme Court in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). Much of the discussion in the hear-

ings was apparently based on that premise, and some aspects of the Richmond plan follow the *Fullilove* set-aside to the letter. If the City Council did rely on that premise, it was in error. National findings do not alone establish the need for action in a particular locality. If they did, the *Wygant* Court's rejection of societal discrimination as a basis for remedial action would be undercut. For a locality to show that it enacted a racial preference as a remedial measure, it must have had a firm basis for believing that such action was required based on prior discrimination by the locality itself. The Court upheld the set-aside in *Fullilove* based on Congress's well-founded belief that such a program was needed at the federal level; the Court emphasized the special competence of Congress to act on such a finding. 448 U.S. at 483, 100 S.Ct. at 2777; 448 U.S. at 499-502, 100 S.Ct. at 2785-87 (Powell, J., concurring). Localities cannot disregard the line between remedial measures and political transfers by adopting the *Fullilove* program as though it were boilerplate.

B.

The record of prior discrimination supporting the Richmond plan is deficient. Its deficiency is made more clear by comparison with plans considered in other circuits. For example, in *Valentine v. Smith*, 654 F.2d 503 (8th Cir.1981), the record of prior discrimination supporting the racial preference included reviews by the Office of Civil Rights of the Department of Health, Education, and Welfare (HEW) and also a successful Title VI suit in federal district court. A similar record supported the preference in *Kromnick v. School Dist of Philadelphia*, 739 F.2d 894 (3d Cir.1984).

In *Associated General Contractors v. Metropolitan Dade County*, 723 F.2d 846 (11th Cir.1984), the locality had "reliable, substantial information compiled by independent investigations" that showed "*identified discrimination* against Dade County black contractors. . . ."

Id. at 853 (emphasis in original). The Court in *Ohio Contractors Assoc. v. Keip*, 713 F.2d 167 (6th Cir.1983), found that the state's racial preference was a remedial measure partly because the legislators

> were informed of the findings of racial discrimination in state contracting made in connection with an earlier joint resolution of the legislature and the contents of the report of a special 'task force' established by the state attorney general which found a severe numerical imbalance in the amount of business the state did with minority groups.

Id. at 171. The court went on to describe various studies comparing the volume of minority contracts with the number of minority *businesses*, rather than the minority population as a whole.

Finally, in *Fullilove*, the Supreme Court noted that Congress's decision to enact a minority set-aside for federal contracts was supported by reports of congressional committees, the U.S. Civil Rights Commission, and the General Accounting Office. *See* 448 U.S. at 465-67, 100 S.Ct. at 2768-69; *id.* at 503-06, 100 S.Ct. at 2787-89 (Opinion of Powell, J.).

Of course, we do not intimate any view of the adequacy of the plans described in *Valentine*, *Kromnick*, *Associated General Contractors*, and *Ohio Contractors*. These cases were all decided prior to the *Wygant* decision. We note only that the support offered for the Richmond plan is extremely weak in comparison. The plan was not supported by any impartial report, any meaningful statistical evidence, or even by anecdotal allegations of prior discrimination. Based on such a record, we cannot uphold the plan as a remedial measure under *Wygant*. If this plan is supported by a compelling governmental interest, then so is every other plan that has been enacted in the past or that will be enacted in the future.

III.

Even if we accepted that the Richmond racial set-aside was justified by a need to remedy prior discrimination, the plan still fails because it is not narrowly tailored to that remedial goal. It is of central importance to equal protection under law that public distinctions between citizens on the basis of their race be narrowly and specifically framed. *Wygant*, 106 S.Ct. at 1849-50. The thirty percent quota was chosen arbitrarily; it was not tied, for example, to a showing that thirty percent of Richmond subcontractors are minority-owned. The figure simply emerged from the mists. The combination of a large set-aside and a small number of actual minority beneficiaries presents a special potential for abuse. As such, it imposes an overbroad competitive burden on nonminority businesses.

The competitive disadvantage is far greater than the thirty percent minimum set-aside suggests. In many construction contracts, the dollar allocation among subcontractors will not break into a thirty percent block. If, for example, a project required three subcontractors whose respective efforts represented 55, 25, and 20 percent of the total project cost, compliance with the Richmond ordinance could come only by awarding 55 or 45 percent of the total dollar amount to racially preferred businesses. In this case, the supply of plumbing fixtures represented 75 percent of the cost of the total project, an amount Croson was obliged to award to a minority enterprise in order to meet the minimum 30 percent set-aside. Such means "unnecessarily trammel the rights of innocent individuals directly and adversely affected by a plan's racial preference." *Wygant*, 106 S.Ct. at 1854 (Opinion of O'Connor, J.). The disadvantage is further compounded by the fact that minority prime contractors are exempt from the higher construction costs often imposed by the MBE subcontract set-aside while nonminority primes are subject to them. Richmond City Code, Ch. 24.1, Art. VIII-A(A).

In addition, the definition of minority-owned business is itself not narrowly tailored to the remedying of past discrimination. The Richmond plan defines "minority group members" as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." This definition nearly duplicates the definition that drew fire in *Wygant*:

> The Board's definition of minority to include blacks, Orientals, American Indians, and persons of Spanish descent . . . further illustrates the undifferentiated nature of the plan. There is no explanation of why the Board chose to favor these particular minorities or how in fact members of some of the categories can be identified. Moreover, respondents have never suggested—much less formally found—that they have engaged in prior, purposeful discrimination against members of each of these minority groups.

106 S.Ct. at 1852 n. 13.

The same aggregation problem is present in the Richmond plan. A record of prior discrimination against blacks by a governmental unit would not justify a remedial plan that also favors other minority races. The need for this kind of narrow tailoring, like the need for findings of past discrimination, arises because the governmental unit enacting a racial preference must limit itself to remedying past discriminatory practices.

Finally, as was noted by the prior opinion in this case, the presence of an expiration date and a waiver provision may help to narrow the scope of a plan's operation. *Croson*, 779 F.2d at 191. Those features cannot, however, salvage an ordinance which otherwise transgresses *Wygant*'s standards. Whether the Richmond plan will be retired or renewed in 1988 is, at this point, nothing more than speculation. Nor does the waiver here cure the constitutional defects defined by the *Wygant* decision. The waiver is to be granted "only in exceptional circum-

stances" and as a matter of administrative discretion. The burden of obtaining the waiver rests at all times upon the prime contractor who must demonstrate the unavailability or the unwillingness of racially preferred enterprises to participate in the contract project. *See Croson*, Appendix B, 779 F.2d at 179-80. We doubt that any waiver, let alone the restrictive provisions of the waiver in this case, could cure the objectionable aspects of the Richmond ordinance.

Although this case presents a Fourteenth Amendment claim rather than a Title VII claim, the Supreme Court's recent pronouncement on Title VII in *Johnson*, *supra*, is still instructive. The Court may have adopted a different standard for evaluating challenges to plans under Title VII than under the Fourteenth Amendment, but it has insisted in both contexts that remedial efforts must ensure fair treatment of whites and blacks, males and females. The Court stressed in *Johnson* that the Agency plan permitted competition among qualified aspirants, 107 S.Ct. at 1455; the Richmond plan, by contrast, aims to stifle competition in the interest of a rigid set-aside. The plan upheld in *Johnson* made race or gender "but one of numerous factors" considered by the government agency in its employment decisions. *Id.* The race or gender of an applicant was merely a "plus"; no rigid quotas or set-asides were used. The Court characterized the program as a "moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force." *Id.* at 1457. None of the factors emphasized by the Court in *Johnson* apply to Richmond's plan, which features the combination of an inadequate foundation for remedial action plus a "reflexive adherence to a numerical standard" which the Supreme Court in *Johnson* disavowed. *Id.* at 1455.

IV.

The *Wygant* requirements amount to more than a trivial hurdle for localities that wish to draw racial dis-

tinctions. They are the heart of the Supreme Court's approach to the constitutionality of remedial preferences. Nothing in *Wygant* outlaws all such preferences, and subsequent cases have clarified their reach. *Wygant* does, however, limit racial preferences to what is necessary to redress a practice of past wrongdoing. The Richmond ordinance reflects the most casual deployment of race in the dispensation of public benefits. It prefers some, and in so doing diminishes the rights of all. *Wygant* rejected that approach, and with it the notion that racial distinctions among citizens will ever become the perfunctory reality of public life.

The judgment of the district court is reversed and the case is remanded for a determination of appropriate legal and equitable relief.

REVERSED AND REMANDED.

SPROUSE, Circuit Judge, dissenting:

As the majority notes, the Supreme Court remanded our previous decision for us to consider the constitutionality of the City of Richmond's affirmative action ordinance in light of *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). In my view the majority both misconstrues and misapplies *Wygant*. In his plurality opinion, Justice Powell stated that any classfication based on race "must be justified by a compelling governmental interest," *id.* at 1846 (plurality opinion) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 1881, 80 L.Ed.2d 421 (1984)), and "the means chosen . . . to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'" *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 480, 100 S.Ct. 2758, 2775, 65 L.Ed.2d 902 (1980)). Four justices in *Wygant* also expressed the view that "societal discrimination" is not a sufficient basis for demonstrating a com-

pelling governmental interest.[3] I think the Richmond ordinance easily satisfies Justice Powell's two-prong test and, assuming that a majority of the Court eventually will adopt the "societal discrimination" modification, it satisfies the test even as modified.

I.

On April 11, 1983, the Richmond City Council, the legislative body of the City of Richmond, voted six to three to adopt the affirmative action ordinance at issue in this case.[4] It acted in response to information presented at a public hearing held that day that, among other things, indicated that although minority groups made up fifty percent of the City's population, only two-thirds of one percent of the City's construction contracts from 1978-1983 were awarded to minority businesses. The ordinance required all contractors to whom the City awarded construction contracts to subcontract at least thirty percent of the dollar amount of the contract to minority business enterprises (MBEs) unless the City waived the requirement. The ordinance was expressly remedial, "enacted for the purpose of promoting wider participation by minority business enterprises in the construction of public projects."[5] It automatically expires on June 30, 1988.

During a prolonged debate prior to enacting the ordinance, the Council reviewed the history of public procure-

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[3] The majority correctly states that five Justices concurred in the judgment that the remedy in *Wygant* was unconstitutional. It also properly notes, albeit somewhat implicitly, that Justice White, who provided the crucial fifth vote in the case, did not join in the opinions of either Justice Powell or Justice O'Connor. The majority's assertion, therefore, that the "*Wygant* Court[] reject[ed] . . . societal discrimination as a basis for remedial action," at 1359, is misplaced. Only four Justices adopted this position, Justice White did not.

[4] *See generally* Richmond, Va.Code Ch. 24.1, Art. I(F) (Part B) (27.10) (27.20) and Art. VIII-A.

[5] Richmond, Va.Code Ch. 24.1, Art. VIII-A(C).

ment in Richmond.[6] The Council and witnesses had available historical records of city contracting, which showed that minorities, who constituted fifty percent of the City's population, had been awarded over a five-year period only two-thirds of one percent of the City's contracting business. The debate was sharp, and the issue was well defined. Unchallenged statements of council members demonstrated that the ordinance was designed to serve a remedial purpose. One councilman observed that the Council had "reviewed the history of the construction contracts" and structured the proposed ordinance in accordance with federal law (presumably the statute interpreted by the Supreme Court in *Fullilove*). Another councilman stated:

> And I can say without equivocation, that the general conduct in the construction industry in this area, and the State and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread.
>
> I think the situation involved in the City of Richmond is the same, and I would like to give the Clerk a copy of the listing of the contracts for the past five

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[6] At the hearing, the Council heard from: Esther Cooper; Freddie Ray, President of Task Force for Historic Preservation in Minority Communities; Stephen Watts, attorney representing Associated General Contractors of Virginia; Richard Beck, president of a local plumbing contractors' association; Mark Singer, a representative of the electrical contractors' association; Patrick Murphy, American Subcontractors Association; Al Shuman, Professional Estimators Association. During the debate between Council members, those opposed to the ordinance contended it was unfeasible because there were insufficient numbers of minority contractors, because it would inflate contract bids and because it would not be conducive to top quality work. Council members favoring the ordinance emphasized the history of discrimination in the construction industry, the current difficulties encountered by MBEs in the Richmond area, and the success of similar set-aside programs in other parts of the country. *Hearing on Adoption of Minority Business Utilization Plan*, Richmond City Council, April 11, 1983.

> years awarded by the City of Richmond. Contracts totalling over 124 million dollars. And less than one percent were given—were awarded to minorities. I think the question of whether or not remedial action is required is not open to question.

A city councilman and the city manager further urged that the construction industry discriminated against persons on the basis of race, both in the city of Richmond and the state of Virginia. A number of contracting association representatives took part in the hearing, and none denied this claim—although several asserted that their own organizations did not discriminate on the basis of race.[7] Proponents of the ordinance asserted that this discrimination was parallel to and part of the discrimination that currently existed in the nation's construction industry.[8] Likewise, opposing witnesses and council members did not deny this assertion. As noted, after the debate ended the Council approved the "set-aside" ordinance by a vote of six to three.

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[7] One of the contractor representatives speaking in opposition to the bill cited statistics to the effect that, of the construction contractors in the United States, only 4.7% were minority contractors and 41% of that figure were located in five states. The balance were scattered among the other 45 states, including Virginia. In other words, in a 45-state area (including Virginia) only 2.8% of the contractors were minorities. The spokesman for the general contractors of Virginia testified that there were 600 contractors in the state association and 130 in Richmond. None were black. Other witnesses testified that none of the 150 Virginia plumbing, heating and cooler contractors were black; that three of the 200 electrical contractors in the state were black; that none of the 150 to 200 Virginia members of the American Subcontractors Association were black; that one of 60 members of the central Virginia contractors association was black; and that one of 45 professional estimators in the Richmond association was black.

[8] The Supreme Court in *United Steelworkers of America v. Weber*, 443 U.S. 193, 198 n. 1, 99 S.Ct. 2721, 2725 n. 1, 61 L.Ed.2d 480 (1979), noted that: "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice."

II.

A.

In the majority's view, the Council totally failed to establish prior discrimination in the awarding of public construction contracts. This is a slippery foundation upon which to build the principal part of its opinion.[9] Assuming, however, a requirement that lacked majority support in *Wygant*, I am persuaded that the Richmond Council had a firm basis for believing it had engaged in past discrimination in awarding public contracts.

Initially, it is essential that we keep our appellate task in the proper perspective. We are not reviewing findings of fact and, as the majority concedes, we do not review the Council's actions under the same criteria by which we review judicial decisions. If that were the case, our review would intrude into the local legislative process and impose undue limitations on local policymakers. Here, however, we need only be assured that the council members, "who are presumably fully aware both of their duty under federal law to respect the rights of *all* their [contractors] and of their potential liability for failing to do so, act[ed] on the basis of information which g[ave] them a sufficient basis for concluding that remedial action

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[9] It must be emphasized that *Wygant* simply does not mandate "particularized findings" of "prior discrimination *by the government unit involved*," At 1357 and 1358 (emphasis in original), as a constitutional prerequisite to the validity of a race-conscious remedy for unlawful discrimination. The suggestion that a public entity may never implement such a remedy to redress the effects of discrimination it had not perpetrated is supported only by Justice Powell's opinion for a three-Justice plurality. Even that opinion did not make, in the words of the present majority, "particularized findings . . . [of actual discrimination] essential." *Id.* at 1357. Indeed, a majority of the Court disclaimed any such requirement, *see Wygant*, 106 S.Ct. at 1853 (O'Connor, J., concurring), and only four Justices would expressly require a public actor to document (at minimum) that it "has a firm basis for believing that remedial action is required." *See id.*

is necessary . . . ." *Wygant*, 106 S.Ct. at 1855-56 (O'Connor, J., concurring). As Chief Justice Burger has observed, "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove*, 448 U.S. at 478, 100 S.Ct. at 2774 (plurality opinion). The Chief Justice was considering congressional power in a tripartite government context, but his observation also relates to the legislative nature of the procedings. We should at least give similar deference to the Council's proceedings. Considering the gross disparity between the resources of the City Council of Richmond and the United States Congress, I am convinced that the Council proceeded on a firm basis for believing that its ordinance was necessary to remedy the effects of prior racial discrimination in the awarding of public construction contracts.

The Council was satisfied that the pervasive discrimination existing in the nation's craft unions and construction businesses also existed in Richmond. Minority contractors had received only two-thirds of one percent of city construction contracts between 1978 and 1983, although the minority population of Richmond during this period was approximately fifty percent. The Council was convinced that this disparity resulted from purposeful discrimination against minority contractors.

I would not disagree with the majority's observation that the Council did not make particularized findings of past discrimination.[10] No one testified, for example, that

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[10] Under the view held by a majority of the Court in *Wygant*, such findings clearly are not necessary. *See supra* p. 1363, n. 7. In her concurring opinion, Justice O'Connor stated "[t]he imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations." *Wygant*, 106 S.Ct. at 1855 (O'Connor, J., concurring).

he had applied for a city contract and was denied it because he was black. However, not only is such evidence "hard to come by," but municipal legislative proceedings simply are not geared to producing it, even if it is available. Additionally, as Justice O'Connor recognized, the requirement of such a *mea culpa* finding might be fatally counter-productive to the concept of affirmative action.

A statistical showing is not a prerequisite to an affirmative action plan and is particularly inappropriate in situations of this type. There are, for example, one hundred thirty members in the general contractor association of Richmond. None are black. Information developed during the council debate revealed that blacks constitute less than one percent of construction contractors involved in all crafts. The award of two-thirds of one percent of public contracts to an approximately equivalent percentage of qualified minority contractors would hardly establish a prima facie case of discrimination.

It seems inevitable, however, that a proof scheme requiring a comparison of the percentage of contracts awarded with this small qualified pool of minority contractors would ensure the continuation of a systemic *fait accompli*, perpetuating a qualified minority contractor pool that approximates two-thirds of one percent of the overall contractor pool.[11] It is true that in a case amen-

[11] To require such a proof scheme, as does the majority, creates a gross anomaly. To illustrate, assume that in some metropolitan areas, the percentage of qualified minority contractors is approximately equivalent to the percentage of minorities in their general population. An affirmative action plan might be allowed in these areas because there would be a statistical basis to show a discrepancy between the percentage of minorities awarded contracts and the percentage of qualified minority contractors. In contrast, a plan would not survive the proof scheme in areas where discrimination had effectively prohibited the entry of minorities into the contracting business, as in Richmond, because there would be no discrepancy between the two points of comparison. It is anomalous that truly pernicious discrimination could have the compound effect of blocking remedial action.

able to statistical proof, a comparison of the percentage of construction contracts awarded to minority contractors and the percentage of minorities in the general population usually would be probative of "societal discrimination." I suggest, however, that two-thirds of one percent compared to a minority population of fifty percent breaks the bounds of the sometimes suspect "science" of statistics and is probative of a good deal more than general discrimination.

In my view, therefore, not only was the traditional statistical data unavailable, it was not necessary to support the Council's conclusions. The Council, for the reasons I have discussed, had a firm basis for concluding that the remedial ordinance was necessary to cure the ills of past discrimination in awarding public contracts.

B.

As I have said, this "firm basis" satisfies the compelling state interest test, even considering the "societal discrimination" limitations that might modify that requirement. Justice Powell in *Wygant* stated:

> Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.
>
> . . . . .
>
> No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive.

Wygant, 106 S.Ct. at 1848 (plurality opinion). Justice Powell expressed this concern against the background of the explicit approval by the circuit court in *Wygant* of the "role model" and "societal discrimination" bases for the affirmative action plan involved there. In this case, however, there was no suggestion before the Council that the Richmond business community needed a "role model"

in the form of highly visible minority contractors performing public work, or even that the minimal presence of minority contractors in that endeavor was caused by such "societal" discriminatory factors as past inferior education or lack of access to social institutions.

The conclusions that emerged from the Council's debate concerned the City's previous discrete discrimination in awarding contracts for public construction projects. However, even if the lack of contracts awarded to minority contractors resulted from both societal discrimination and discrete discrimination in public construction, that fact should not preclude an affirmative action remedy for the latter. The line between "societal" discrimination and discrete discrimination may in fact sometimes be illusory.[12] For example, Justice O'Connor noted that the

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[12] A good argument can be made that the converse of Justice Powell's statement is also true—discrimination that is not amorphous cannot merely be labeled "societal discrimination" and dismissed from consideration in establishing affirmative action programs. Lawyer and humanitarian that he is, I cannot believe that Justice Powell meant to dismiss concrete examples of man's inhumanity to man simply because the deprivation was not caused by an identified employer or governmental representative. What is amorphous to one unaffected may be all too painfully clear to one whose livelihood has been adversely affected or whose children cannot receive opportunities equal to their brethren. I do not understand Justice Powell's position to be that societal discrimination can never be part of an appropriate basis for imposing such a remedy. Instead, I believe he is saying that before an entity enacts an affirmative action program, it must have a strong basis for concluding the program is necessary to correct racial imbalances directly attributable to racial discrimination, whether or not it is in part societal discrimination.

In *Wygant*, for example, a number of unexplained reasons could have accounted for the disparity between the percentage of minority teachers and the percentage of minority students in the Jackson school system. A generalized belief that some amorphous, or "societal," discrimination contributed to that disparity was insufficient to justify the School Board's affirmative action program. In *Fullilove*, however, the program constituted an appropriate remedy, in light of Congress' well-documented finding that both public and private

court of appeals in *Wygant* apparently had assumed "that in the absence of a specific, contemporaneous finding, any discrimination addressed by an affirmative action plan could only be termed 'societal.'" *Wygant*, 106 S.Ct. at 1854 (O'Connor, J., concurring). She emphasized that such an assumption was false. *Id.* Here, "societal discrimination" may have been a force encouraging disparate treatment in many specific areas of human endeavor. The Council, however, was entirely concerned with discrimination discretely directed at minority contractors, not with the general "societal discrimination" that only coincidentally included contractors within its negative sweep.

III.

I also think the majority completely misses the mark with its conclusion that the ordinance is not narrowly tailored to achieve its remedial goal.[13] There is no question, of course, that such tailoring is an essential element

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discrimination directly contributed to the small percentage of public contracts awarded minority contractors. There, Justice Powell concurred in the Court's judgment that upheld Congress' ten-percent set-aside program for minority contractors.

[13] As an alternative basis for its holding, the majority concludes that the ordinance is not narrowly tailored to the remedial goal of eliminating discrimination. It reasons that the thirty-percent minority set aside is over-inclusive and hypothesizes that in certain contracts the thirty-percent figure would have to be adjusted upward. These conclusions of the majority lack evidentiary support; to use a phrase coined by the majority, they "emerge[] from the mists."

In their opinions in *Wygant*, both Justices Powell and O'Connor reaffirmed the principle that the plaintiff bears the overall burden of proving the constitutional invalidity of an affirmative action plan. *Wygant*, 106 S.Ct. at 1848 (plurality opinion); *id.* at 1856 (O'Connor, J., concurring). In the present case, the plaintiff presented no evidence to the trial court to suggest that the thirty-percent set aside was overbroad. The majority's finding of over-inclusiveness, therefore, suffers from the same lack of a "firm basis" that it erroneously imputes to the Council.

of an affirmative action plan. In *Fullilove*, however, Justice Powell noted that the Supreme Court "has not required remedial plans to be limited to the least restrictive means of implementation." *Fullilove*, 448 U.S. at 508, 100 S.Ct. at 2790 (Powell, J., concurring). Moreover, Justice Powell identified several considerations to guide the determination of whether the plan is sufficiently narrow, *e.g.*, the duration of the plan, the availability of waiver provisions, the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population of work force, and the effect on innocent third parties. 448 U.S. at 510-11, 100 S.Ct. at 2791 (Powell, J., concurring). I am convinced that under these criteria the ordinance is sufficiently narrow.

The first two criteria need little discussion. The Richmond Plan is designed to last only five years. Its waiver provisions were purposefully drawn to parallel those approved in *Fullilove*. Even the majority concedes, as it must, that these factors help narrow the scope of the ordinance.

The third criterion identified by Justice Powell requires a more detailed analysis. It must be conceded that a set-aside plan limited to the current percentage of minority contractors would not eliminate the present low level of minority participation in government contracting. In remedying the effects of discrimination, a program obviously must set aside much more than two-thirds of one percent of subcontract work if it is to encourage minorities to enter the contracting industry and encourage existing minority contractors to grow.[14] *See Fullilove*, 448

[14] The Supreme Court most recently approved a similar approach in *United States v. Paradise*, —— U.S. ——, 107 S.Ct. 1053, 94 L.Ed.2d 203 (U.S. 1987) where the evidence demonstrated that the Alabama Department of Public Safety steadfastly had resisted the promotion of black troopers. *See also Johnson v. Santa Clara County*, —— U.S. ——, 107 S.Ct. 1442, 94 L.Ed.2d 615 (U.S. 1987);

U.S. at 513-14, 100 S.Ct. at 2792-93 (Powell, J., concurring) (10% set-aside acceptable, where 17% of the population and only 4% of the contractors were minority group members); *Schmidt v. Oakland Unified School Dist.*, 662 F.2d 550, 559 (9th Cir. 1981), *vacated on other grounds*, 457 U.S. 594, 102 S.Ct. 2612, 73 L.Ed.2d 245 (1982) (25% goal acceptable in light of city's 34.5% non-white population; decision vacated for failure to reach merits of state statutory issue prior to deciding constitutional claim); *Southwest Washington Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County*, 100 Wash.2d 109, 667 P.2d 1092, 1101 (1983) (MBE par-

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Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC, —— U.S. ——, 106 S.Ct. 3019, 3050-51, 92 L.Ed.2d 344 (1986). Although approaching the problem in a different procedural context, the decision in *Paradise* demonstrated the propriety of a temporarily imposed overrepresentation to meet a long-range goal. After considerable litigation, the district court ruled that fifty percent of all promotions from trooper to corporal must be from a labor pool consisting of black troopers, even though that pool consisted of only twenty-five percent of the total trooper pool. Responding to the Department's argument that this exceeded a statistical balance by twice, the Court said:

> The Government suggests that the one-for-one requirement is arbitrary because it bears no relationship to the 25% minority labor pool relevant here. This argument ignores that the 50% figure is not itself the goal; rather it presents the speed at which the goal of 25% will be achieved. The interim requirement of one-for-one promotion . . . would simply have determined how quickly the Department progressed toward this ultimate goal.
>
> . . . . .
>
> Although the appropriate ratio here "necessarily involve[d] a degree of approximation and imprecision," *Teamsters v. United States*, 431 U.S. 324, 372 [97 S.Ct. 1843, 1873, 52 L.Ed.2d 396] (1977), the District Court, with its first-hand experience of the parties and the potential for resistance, imposed the requirement that it determined would compensate for past delay and prevent future recalcitrance, while not unduly burdening the interests of white troopers.

Paradise, —— U.S. at ——, 107 S.Ct. at 1070 (footnote omitted).

ticipation goal of 11% set at slightly less than county's minority population held acceptable). Common sense dictates that judging the set-aside percentage by referring to the small proportion of existing MBEs in the economy would perpetuate rather than alleviate past discrimination.

As to Justice Powell's last suggested criterion, *i.e.*, the effect on innocent third parties—the favoring of a percentage of minority contractors will, of course, disfavor a percentage of nonminority contractors. That is the negative side of the necessary balancing in any affirmative action program: "innocent persons may be called upon to bear some of the burden" of remedying the effects of discrimination. *Wygant*, 106 S.Ct. at 1850 (plurality opinion). Here, however, as with *hirings* in employment cases (as opposed to *layoffs*), the result is not to deprive a nonminority member of something already possessed but to limit temporarily a future opportunity. This distinction has been noted with approval in a number of Supreme Court cases. In *Wygant*, for example, Justice Powell said:

> In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.

106 S.Ct. at 1851 (plurality opinion) (emphasis in original). The ordinance is narrowly drawn; it satisfies all of the *Fullilove* criteria.

For all these reasons, I would affirm the judgment of the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1002(L)
No. 85-1041

J.A. CROSON COMPANY,
Appellant,

versus

CITY OF RICHMOND,
Appellee.

ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Amicus Curiae.

On Petition for Rehearing with Suggestion
for Rehearing In Banc

[Filed Sept. 18, 1987]

ORDER

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. In a requested poll of the Court. Judges Winter, Phillips, Murnaghan, Sprouse, Ervin voted to rehear the case in banc; and Judges Russell, Widener, Hall, Chapman,

Wilkinson and Wilkins voted against rehearing the case in banc. As a majority of the judges voted to deny rehearing in banc, and

As the panel considered the petition for rehearing, Judge Hall and Judge Wilkinson are of the opinion that it should be denied and Judge Sprouse is of the opinion it should be granted;

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

IT IS FURTHER ORDERED that the motion of the National Lawyers Committee for Civil Rights Under Law for leave to file brief as amicus curiae is granted.

Entered at the direction of Judge Sprouse, with the concurrence of Judge Hall and Judge Wilkinson.

For the Court,

/s/ John M. Greachen
Clerk

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Record No. 85-1002(L)

J.A. CROSON COMPANY,
Appellant,

v.

CITY OF RICHMOND,
Appellee.

Record No. 85-1041

CITY OF RICHMOND,
Appellant,

v.

J.A. CROSON COMPANY,
Appellee.

Appeals from the United States District Court for the
Eastern District of Virginia, at Richmond
Robert R. Merhige, Jr., District Judge

NOTICE OF APPEAL

Notice is hereby given, in accordance with United States Supreme Court Rule 10, that the City of Richmond

appeals to the United States Supreme Court from the final judgment entered in this action on July 9, 1987, upon denial of the City's timely petition for rehearing by order dated September 18, 1987. Appeal to the United States Supreme Court is taken under the authority of 28 U.S.C. Section 1254(2).

Respectfully submitted,

CITY OF RICHMOND

By: /s/ Michael L. Sarahan
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was mailed, postage pre-paid, to Walter H. Ryland, Esquire, WILLIAMS, MULLEN, CHRISTIAN & DOBBINS, P.O. Box 1320, Richmond, Virginia 23210, to Michael E. Kennedy, Esquire, 1957 E. Street, N.W., Washington, D.C. 20006 and to James E. Coleman, Jr., WILMER, CUTLER & PICKERING, 2445 M Street, N.W., Washington, D.C. 20037-1420, on this the 18th day of November, 1987.

/s/ Michael L. Sarahan

APPENDIX D

IN THE
SUPREME COURT OF THE UNITED STATES

No. 85-1345

J.A. CROSON COMPANY,
Petitioner,

v.

CITY OF RICHMOND

Case below, 779 F.2d 181.

July 7, 1986. On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Wygant v. Jackson Board of Education*, 476 U.S. ——, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986).

87-998

No. ———

Supreme Court, U.S.
FILED
DEC 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J. A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL APPENDICES TO JURISDICTIONAL STATEMENT

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EDITOR'S NOTE

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1002(L)

J. A. Croson Company, Appellant,

versus

City of Richmond, Appellee.

Associated General Contractors of America,
Americus Curiae.

No. 85-1041

J. A. Croson Company, Appellee,

versus

City of Richmond, Appellant.

Associated General Contractors of America,
Americus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr. District Judge. (CA 84-0021-R).

Argued: July 17, 1985
Decided: November 25, 1985

Before HALL, SPROUSE, and WILKINSON, Circuit Judges.

Walter H. Ryland (Williams, Mullen & Christian on brief) for Appellant/Cross-Appellee; Reginald M. Barley, Senior Assistant City Attorney; (Michael L. Sarahan, Assistant City Attorney on brief) for Appellee/Cross-Appellant; (Michael E. Kennedy for Amicus Curiae).

SPROUSE, Circuit Judge:

In its action in the district court for an injunction, declaratory relief and damages, J.A. Croson Company (Croson), challenged the Minority Business Utilization Plan of the City of Richmond.[1] The court ruled in favor of the City declaring the Plan valid and Croson brought this appeal.[2] The City of Richmond appeals the district court's

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[1]The action was originally filed in the Circuit Court of the City of Richmond. It was removed to the federal district court pursuant to 28 U.S.C. § 1441 (a) (1982). The district court assumed original jurisdiction over Croson's federal constitutional claims pursuant to 28 U.S.C. § 1331 (1982) and over Croson's state law claims by pendent jurisdiction. After the district court denied Croson's motions for summary judgment, the case was submitted on depositions, stipulations of evidence, and limited testimony.

[2]In a companion case Mega Contractors, Inc. v. City of Richmond, CA 84-0022-R, the district court ruled for the city and Mega did not appeal.

denial of its motion for attorneys' fees. We affirm the district court's judgment in its entirety.

I.

The dispute arose from the application of Richmond's Minority Business Utilization Plan (the Plan) to Croson's bid on a proposed city contract to install plumbing fixtures at the City Jail. Croson, an Ohio mechanical, plumbing, and heating contractor with a Richmond branch, was the only bidder, but City officials refused to award it the contract since it did not obtain the services of a minority subcontractor as required by the Plan. After the City nullified Croson's bid and reopened the bidding, Croson filed this action for injunction, declaratory relief, and damages. It asked primarily that the Plan be declared void under Virginia statutory and constitutional law as well

as under the fourteenth amendment to the United States Constitution. The trial court denied cross-motions for summary judgment, and after a bench trial ruled that the Plan was valid.

II.

The Richmond Council adopted the Plan on April 11, 1983. Richmond Va. Code Ch. 24.1, Art.I(F) (Part B) (27.10) (27.20) and Art. VIII-A. It acted in response to information presented at a public hearing held that day which, among other things, indicated that, although minority groups made up 50% of the City's population, only 0.67% of the city's construction contracts for the five-year period from 1978-1983 were awarded to minority businesses. Simply stated, the Plan requires all contractors to whom the city awards construction contracts to subcontract at least 30% of the dollar amount of the contract to minority

business enterprises (MBEs) unless the requirement is waived. Richmond, Va. Code Ch. 24.1, Art. VIII-A(A), (B).[3] The Plan is expressly remedial in nature and was "enacted for the purpose of promoting wider participation by minority business enterprises in the construction of public projects." Richmond, Va. Code Ch. 24.1, Art. VIII-A(C). It automatically expires on June 30, 1988, approximately five years after its effective date. Id.

Five months after enacting the Plan, the City issued an invitation to bid on

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[3] The Plan defines an MBE as "[a] business at least fifty-one percent of which is owned and controlled or fifty-one percent minority-owned and operated by minority group members, or in case of a stock corporation, at least fifty-one percent of the stock which is owned and controlled by minority group members." Richmond, Va. Code Ch. 24.1, Art. I(F) (Part B) (27.10). "Minority group members" are defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." Richmond, Va. Code Ch. 24.1, Art. I(F) (Part B) (27.20).

the contract for the installation of plumbing fixtures at the City Jail involved in this dispute. The specifications defined fixtures manufactured by either Acorn Engineering Company or Bradley Manufacturing Company as suitable for the project. Croson, a non-MBE plumbing contractor, received the bid documents on September 30, 1983 and submitted its bid on October 12. After receiving the documents, Eugene Bonn, Croson's regional manager in Richmond, determined that the 30% MBE requirement on this project could only be met if an MBE was utilized as a supplier furnishing either the Acorn or Bradley plumbing fixtures.

Bonn telephoned either five or six MBEs on September 30 to obtain quotes on the fixtures.[4] There is a dispute as to the date Bonn first contacted Continental Metal Hose, the only one of these MBEs

located in Richmond. Bonn testified that he contacted Melvin Brown, the president of Continental, on September 30. Brown, however, claimed that he was not contacted until October 12, 1983--the last day on which bids could be submitted.

On the morning of October 12, Bonn made a second brief round of telephone calls to MBEs, including a call to Brown of Continental. Brown informed him that Continental wished to participate in the project. Brown then contacted two

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[4] The district court was unable to determine the exact number. (It was either 5 or 6). Telephone records submitted at trial, however, indicated that Bonn's September 30 long-distance telephone calls to all of these MBEs lasted a total of less than ten minutes. Officers of one of the MBEs testified they never received Bonn's call and it appears they were absent from the office. Representatives of two others testified that they were interested in bidding and asked Bonn to send them bid specifications in order to prepare price quotations for the fixtures, but that he never complied with this request.

sources of Bradley fixtures, Ferguson Plumbing Supply and W. G. Leseman. Ferguson informed Brown that the company had already provided a direct quote to Croson for the fixtures and consequently would not provide a quote to Brown. Leseman told Brown that it was not allowed to quote to unknown suppliers until the supplier had undergone a credit investigation taking at least thirty days.

On October 13, City officials opened the sealed bids, which revealed Croson as the only bidder. Its bid of $126,530 included a quote from a non-minority firm for the plumbing fixtures. That same day, Brown had detailed to Bonn his problems in obtaining a quote for the required fixtures, but Bonn encouraged him to continue his efforts. Although aware of Brown's continuing interest in supplying the fixtures, Bonn submitted a

request for waiver of the 30% MBE requirement to the City on October 19, 1983. In his waiver request, Bonn indicated that Continental was "unqualified" and that the other MBEs contacted were either "non-responsive" or "unable to quote."

On October 27, 1983, Brown learned of Croson's request for waiver and telephoned an agent of Acorn, one of the two fixture manufacturers named in the bid specifications. The agent provided Brown with a quote on October 31, which Brown supplied to Bonn shortly thereafter.

Brown also informed the Director of Purchasing for the Department of General Services on October 27 that Continental could provide the required fixtures. Subsequently, the contract officer responsible for ruling on Croson's waiver request recommended that the request be

disapproved because an MBE was available.

The City, by letter dated November 2, 1983, informed Croson that the Human Relations Commission had "withheld approval" of the waiver request. Croson was given ten days to submit a completed Commitment Form evidencing his compliance with the minority set-aside provision. He was advised that if he failed to submit the Form his bid would be considered non-responsive.

Rather than supplying a completed Commitment Form, Bonn again requested a waiver on November 8, 1983. He argued that Continental was not qualified; that its quotation was substantially higher than any other quotation and was submitted twenty-one days after the bid date. Eight days later, Bonn documented the additional costs that would result should Continental provide the fixtures. He concluded that, if he were required to

subcontract with Continental, the contract price must be increased by $7,663.16. The Department of General Services denied Croson's request to rais the contract price, as well as its renewed request for a waiver. On November 18, the City informed Croson by letter that it had decided to rebid the project and invited Croson to submit a new bid.

Three weeks later, Croson wrote to the Department of General Services requesting a review. The City rejected the request for review on the ground that the decision to rebid the project was not appealable.[5] Croson then filed this suit.

The district court in a well-written decision made comprehensive findings, reviewed both Virginia and Federal law and concluded that the Plan was valid. Croson does not pursue all of the

arguments it raised below, but on this appeal, as at trial, it argues that: (1) under state law the City was without power to adopt the Plan, (2) the Plan is contrary to the public policy of Virginia, (3) the Plan violates the Virginia constitutional proscription against discrimination on the basis of race, color, or national origin, Va. Const. Art. I, § 11, and (4) the Plan violates the equal protection clause of the fourteeneth amendment of the federal Constitution.

Affirmative action legislation creating minority set-aside plans and

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[5] Chapter 24.1, Article VII (C) of the Richmond Code provides that a disappointed bidder may appeal an award of a contract to another party. The appeal mechanism is sufficiently broad to permit appeal of a decision denying a contract to a losing bidder due to his failure to comply with the minority business utilization plan, but the appeal procedures are not available until after an award has been made. Here, because the city announced its decision to reopen the bidding process, no award was made.

designed to ameliorate the effects of past discrimination in public construction contracts have been tested and approved in a number of state and federal decisions. Fullilove v. Klutznick, 448 U.S. 448 (1980); South Florida Chapter of the Associated Gen. Contractors of America, Inc. v. Metropolitan Dade County, Florida, 723 F.2d 846 (11th Cir.) cert. denied, ____ U.S. ____, 105 S.Ct. 220 (1984); Ohio Contractors Ass'n v. Keip, 713 F.2d 167 (6th Cir. 1983); Schmidt v. Oakland Unified School Dist., 662 F.2d 550 (9th Cir. 1981), vacated on other grounds, 457 U.S. 594 (1982); Southwest Washington Chapter, Nat'l Elec. Contractors Ass'n. v. Pierce County, 667 P.2d 1082 (Wash. 1983); contra Arrington v. Associated Gen. Contractors of America, 403 So. 2d 893 (Ala. 1981), cert. denied, 455 U.S. 913 (1982). Because set-asides may be

constitutionally permissible but are not constitutionally mandated, state and local programs must, of course, be permitted under state law. South Florida, 723 F.2d at 852; Schmidt, 662 F.2d at 558; Southwest Washington Chapter, 667 P.2d at 1100. We look first then to the issues of Virginia law raised by Croson both as they relate to pendent questions and as critical components of the test derived from Fullilove. We then examine the Richmond Plan under the Fullilove standards to determine if it survives scrutiny under the equal protection clause of the fourteenth amendment.

III.

Croson contends that the City of Richmond had no power to enact the plan--that it was ultra vires. It urges that the scope of a local government's authority in Virginia is determined by

Virginia's rule of law known as the "Dillon Rule," and that the contested ordinance is not within the purview of that rule. This principle of law is that "local governing bodies have only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." Tabler v. Bd. of Supervisors of Fairfax County, 221 Va. 200, 292, 269 S.E. 2d 358, 359 (1980). It is agreed that Virginia has not expressly authorized cities to adopt procurement set-aside programs for minorities. The validity of the ordinance, therefore, depends on whether it is authorized under one of the other two prongs of the Dillon Rule.

The Virginia Public Procurement Act, Va. Code §§ 11-35 to 11-80 (Supp. 1984), details complete procurement procedures for public bodies subject to its

requirements. The first section of this chapter--section 11-35 explains its purpose and applicability. Under this provision a city which adopts its own procurement policies is exempt from the state scheme provided the city's plan is based on competitive principles. Municipalities may devise local procurement programs when

> ... (the) governing body adopts by ordinance or resolution alternative policies and procedures which are based on competitive principles and which are generally applicable to procurement of goods and services by such governing body and the agencies thereof.

Va. Code § 11-35(D) (Supp. 1984).

The Richmond Business Minority Utilization Plan is not an isolated ordinance. The Council enacted the ordinance creating the Richmond procurement system on December 20, 1982.[6] It added the "Plan" by an amendment to

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[6] Richmond Va. Ordinance No. 82-294-270.

the procurement system on April 11, 1983.[7] The City states that it derives its authority to enact both the general procurement ordinance and the Plan portion of it from section 11-35(D) of the state law. It argues that since its "set aside" ordinance fosters competition, the authority to enact it is implied in section 11-35(D). Croson does not argue that the City's basic procurement ordinance is invalid. It contends, however, that the Plan is not "based on competitive principles" and that it is contrary to the public policy of Virginia.

We think Croson's first contention ignores the continuing anti-competitive effects of past discrimination. The Richmond City Council had before it an

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[7] Richmond Va. Ordinance No. 83-69-59. It was later amended by Ordinance No. 83-127-116 on June 20, 1983.

empirical study that, while one-half of the City's population were members of minority groups, minority-owned business enterprises received virtually none of the city contracts awarded during the five year period 1978-1983. By encouraging minority-owned businesses to enter an area of economic activity where they have previously been absent, the Plan will very likely increase competition as MBEs and teams of MBEs and non-MBEs vie for public contracts. Furthermore, the Plan does not alter the fundamental competitiveness of the bidding process; even under the City's ordinance, the City will award contracts to the "lowest responsive and responsible bidder." Richmond, Va. Code Ch. 24.1, Article IV, § 14(a). Accordingly, we agree with the City and Judge Merhige that the Plan is "based on competitive principles" and therefore that the

authority for the adoption of the set-aside Plan is "fairly implied" from the power expressly granted to Richmond to develop its own procurement procedures under section 11-35(D) of the Virginia Public Procurement Act.

Croson bases its second argument that the Plan is contrary to public policy and therefore invalid on section 11-44 which provides:

> In the solicitation or awarding of contracts, no public body shall discriminate because of the race, religion, color, sex, or national origin of the bidder or offeror.

We agree with the district court that the Plan is not contrary to the public policy of Virginia expressed in Code section 11-44. In the first place, as we have held, the City's Plan is specifically exempted from this and other requirements of the state procurement scheme[8] by section 11-35(D) since it is adopted by an ordinance "based on

competitive principles." The exemption, however, is not necessary to refute the assertion that the Plan is contrary to public policy. Croson ignores the policy implications of section 11-48, which is devoted to encouraging the participation of minority businesses in the performance of public contracting. Section 11-48 provides:

> All public bodies shall establish programs consistent with all the provisions of this chapter to facilitate the participation of small businesses and businesses owned by women and minorities in procurement transactions...State agencies shall submit annual progress reports on minority business procurement to the State Office of Minority Business Enterprise.

Further, at the time sections 11-44 and 11-48 were enacted by the Virginia legislature, it was well established that federal statutes prohibiting racial

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[8] Exempt public bodies are only subject to certain sections of the public procurement act not germane to the issues in this appeal.

discrimination do not necessarily prohibit race-conscious programs designed to remedy the effects of historical racial discrimination. As the district court said:

> Plaintiffs fail to recognize that the word "discriminate" is not self-defining, especially in the context of legislation addressing race relations. In that context, the word does not necessarily proscribe programs that create preferences for blacks and other groups that have historically been the victims of discrimination. See, e.g., United Steelworkers of America v. Weber, 443 U.S. 193, 201-08 (1979).

Croson v. Richmond, No. 84-0021-R, Slip op. at 19, (E.D.Va. December 3, 1984).

Croson asserts, however, that even if the Virginia legislature implicitly intended to authorize minority set-aside programs such as the Richmond Plan, these programs violate Article I, Section 11 of the Virginia Constitution. This Virginia Constitutional article states that "the right to be free from any governmental

discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged." Croson argues that in testing the Plan under this article, the Virginia Supreme Court would apply the strict scrutiny standard because the Plan promotes discrimination based on race. See Duke v. County of Pulaski, 219 Va. 428, 432-33, 247 S.E.2d 824 (1978).

As the parties conceded below, however, the Virginia Supreme Court has interpreted Article I, section 11 "[to be] no broader than the equal protection clause of the Fourteenth Amendment to the Constitution of the United States." Archer v. Mayes, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973). See also Schilling v. Bedford Cty. Memorial Hosp., 255 Va. 539, 303 S.E.2d 905, 907 n.2 (1983). Croson also argues that the Plan violates the equal protection clause of

the United States Constitution's fourteenth amendment. Not only does the resolution of that fourteenth amendment issue answer the argument based on the Virginia Constitution, but it is the principal issue in this appeal.

IV.

The Supreme Court in Fullilove v. Klutznick, 448 U.S. 448 (1980) upheld a minority set aside plan which had been attacked as violative of the equal protection clause of the fourteenth amendment. In the past five years, several circuit courts of appeal as well as state supreme courts have followed and amplified the various rationale of the Court's opinions in Fullilove. South Florida, 723 F.2d 846; Ohio Contractors, 713 F.2d 167; Schmidt, 662 F.2d 550; Southwest Washington Chapter, 667 P.2d 1082; contra Arrington, 403 So.2d 893. Although the Constitution does not

require such affirmative action plans to rectify past discrimination, there is now no question but that constitutionally they may be imposed. There is also little question but that such plans may be implemented by states or their political subdivisions as well as by Congress or private entities. See United Steelworkers of America v. Weber, 443 U.S. 193, 197 (1979); South Florida, 723 F.2d at 852; Ohio Contractors, 713 F.2d at 172; Schmidt, 662 F.2d at 557. Our chore, then, is relatively straightforward--we must determine simply if the Richmond City Plan fits the constitutional mold shaped by the Supreme Court in Fullilove.

In Fullilove, the Supreme Court upheld the 10% set-aside provision of the federal Public Works Employment Act, ("PWEA") 42 U.S.C. § 6705(f)(2) (1982). That provision required state and local

governments applying for federal grants for public works projects to provide assurances that at least 10% of the grant would be expended through minority business enterprises. The statute provided for administrative waivers of the 10% requirement in some instances. While no single standard of analysis for minority set aside programs emerged from the Court's several opinions, the opinions authored by the Chief Justice and by Justice Powell, particularly, have provided the basis for development of standards for judicial review of the set-aside plans. The Chief Justice, writing for himself and Justices Powell and White, employed a three-part standard, examining the statute in order to determine whether (1) the purpose of the program was remedial, i.e. designed to eliminate practices that might serve to perpetuate the effects of prior

discrimination, (2) the objective was within Congress' authority, and (3) the means employed were "narrowly tailored" to achieve the remedial goal. 448 U.S. at 473, 490.

In a concurring opinion, Justice Powell, invoking, as the Chief Justice had not, the traditional strict scrutiny standard, examined the basis of Congress' authority to adopt the program and inquired whether the racial classification served a "compelling" state interest. According to Justice Powell, the interest could not be found to be compelling unless it satisfied a two-part test:

> (1) The governmental body that attempts to impose a race-conscious remedy must have the authority to act in response to identified discrimination; and
>
> (2) The governmental body must make findings that demonstrate the existence of illegal discrimination.

Fullilove, 448 U.S. at 498. Even if the government has proffered a compelling state interest, the court must then determine that the means selected by the governmental body is narrowly drawn to fulfill the governmental purpose. Id. See also South Florida, 723 F.2d at 851-52. In his analysis, Justice Powell noted the factors which various Courts of Appeals had used in reviewing remedial hiring programs; he then utilized these factors in analyzing the congressional program aimed at assisting minority contractors. These factors included (1) the efficacy of alternative remedies, (2) the planned duration of the plan, (3) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force, (4) the availability of waiver provisions if the hiring plan could not be met, and

(5) the effect of the set-aside plan on innocent third parties. Fullilove, 448 U.S. at 510-11, 514-15.

The concurring opinion of Justice Marshall and two other justices stated that an intermediate level of scrutiny should govern review of minority set-aside programs and such programs are constitutionally valid as long as the means chosen are "substantially related" to the avowed remedial purpose. Id. at 519.

The district court in this case recognized the Supreme Court's internal disagreement as to the proper analysis for minority set-aside programs and adopted the approach employed by the Eleventh Circuit in South Florida, 723 F.2d at 851-52, as a proper synthesis of the various Fullilove concerns. This test requires that for a minority set-aside plan to be constitutional:

> (1) [that] the governmental body have the authority to pass such legislation; (2) [that] adequate findings have been made to ensure that the governmental body is remedying the present effects of past discrimination rather than advancing one racial or ethnic group's interests over another; (3) [that] the use of such classifications extend no further than the established need of remedying the effects of past discrimination.

723 F.2d at 851-52.

We agree with the Eleventh Circuit and the district court that this test sufficiently captures the common concerns articulated by the various Supreme Court opinions to provide a general guideline for judging the constitutionality of a set-aside plan.

(a)

As we have noted, supra, there is little doubt that state political subdivisions, if authorized by state law, generally have authority under the United States Constitution to enact minority set-aside programs. See South Florida,

723 F.2d at 852; Ohio Contractors, 713 F.2d at 172. We held in part III of this opinion that the city's authority emanated from the Virginia Legislature. No prolonged discussion then, is needed to demonstrate the Plan's compliance with the first prong of the South Florida test.

(b)

The second requirement of the synthesized Fullilove test is that the governmental body adopting a remedial plan make adequate findings to ensure that it is remedying the present effects of prior discrimination rather than advancing one racial group's interest over another. In reviewing the findings of the Richmond City Council to determine if they satisfy this aspect of the constitutional test, we must maintain the proper perspective of our appellate task. We review not the findings of fact which

underly a judicial decision but those of a legislative branch of government (here a division of state government) to determine if it has carried out its function in a constitutionally acceptable manner. Our review would be more intrusive into the fact-finding process and the limitations we impose on the finders of fact would be stricter if we were reviewing a judicially created remedy. The opinions of the Fullilove Court emphasize the fundamental difference between appellate review of judicially created remedies and legislatively created ones. In his detailed presentation of the background to the congressional findings in the public works set-aside provision, the Chief Justice underscored the broad scope of the fact-finding authority of Congress. Fullilove, 448 U.S. at 483-84. Justice Powell, writing at length to

distinguish the standard for reviewing legislative finding from the normal standard of review of judicial findings, stated:

> Congress is not an adjudicatory body called upon to resolve specific disputes between competing adversaries. Its constitutional role is to be representative rather than impartial, to make policy rather than to apply settled principles of law. The petitioners' contention that this Court should treat the debates on § 103(f)(2) as the complete "record" of congressional decisionmaking underlying that statute is essentailly a plea that we treat Congress as if it were a lower federal court. But Congress is not expected to act as though it were duty bound to find facts and make conclusions of law.
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> ...
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> Acceptance of petitioners' argument would force Congress to make specific factual findings with respect to each legislative action. Such a requirement would mark an unprecedented imposition of adjudicatory procedures upon a coordinate branch of Government. Neither the Constitution nor our democratic tradition warrants such a constraint on the legislative process. I therefore conclude that we are not confined in this case to an examination of the legislative

> history of § 103(f)(2) alone. Rather, we properly may examine the total contemporary record of congressional action dealing with the problems of racial discrimination against minority business enterprises.

Id. at 502-503.

The Chief Justice reviewed in great detail "the total contemporary record of congressional action dealing with the problem of racial discrimination." Id. at 463-67. He noted the ongoing effort by the national government through such agencies as the Small Business Administration and the Office of Minority Business Enterprise to remedy the effects of past discrimination.[9] Id. Having reviewed the breadth of congressional fact-finding in this area, the Court accepted the assertion that

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[9] Most states, including the state of Virginia, have similar offices or departments of Minority Business Enterprise. See Va. Code § 2.1-64.32 (Supp. 1985).

discrimination in the construction industry against minorities has been prevalent in this country and has seriously limited the opportunity of minorities to participate in government contracting. Id. at 461-67. Furthermore, it was not the first such recognition by the Supreme Court of the effect of discrimination on minority participation in the construction industry. In Weber, Justice Brennan noted that "[j]udicial findings of exclusions from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." 443 U.S. at 198, n.1.

The extensive references in the Chief Justice's and Justice Powell's opinions to Congressional power to deal with past discrimination, however, do not imply that state legislative bodies are powerless to act to remedy past

discrimination. South Florida, 723 F.2d at 852, Ohio Contractors, 713 F.2d at 172. As the Eleventh Circuit wrote in South Florida, "although the scope of Congress' power to remedy such discrimination may be greater than that of the states, state legislative bodies are not without authority to ensure equal protection...." 723 F.2d at 852.[10] The

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[10] The Sixth Circuit in Ohio Contractors wrote at greater length and more emphatically on the authority of state government in this area:

> No enabling provision is required to authorize a state government to enact legislation to prevent the denial of equal protection to persons within its jurisdiction. The prohibition against denial of equal protection carries with it the power to prevent such denial and to remedy past violations. When a state legislature takes steps in compliance with the equal protection clause it is acting in the same capacity as that of Congress in adopting legislation to implement the equal protection component of the Fifth Amendment's due process clause.

713 F.2d at 172.

legislative body of the City of Richmond, acting under authority of state law, undertook an approach similar to that which Congress took in enacting the minority set-side in the local public works program. Acting at the local level, the city council in a public legislative session reviewed the history of public procurement in Richmond with the goal of ensuring that public funds would be spent in a nondiscriminatory manner consistent with competitive practices.

Congressional findings of discrimination on a national scale would not alone justify a city legislative finding of past racial discrimination in public contracting in the City of Richmond. They are, however, relevant to the extent that the Richmond City Council determined that the City's record has been and was, in fact, a part of the

national problem. The council debate preceding the enactment of the ordinance creating the Plan demonstrates that the council was aware of the background of the nationwide remedial programs. Proponents pointedly referred to the national background and, importantly, asserted that such discrimination existed in Richmond--a fact not denied by opposing witnesses nor opponents within the council. The council and witnesses, both for and against the Plan,[11] had available complete historical records of city contracting and specifically a statistical study showing that minorities, who constituted 50% of the City's population, had received over a five-year period only 0.67% of the City's contracting business. The debate in council was sharply joined, and there can be no doubt that the legislative issue was well defined. The vote adopting the

Plan was not unanimous--six voted for it--three against it.

Unlike the review we make of a lower court decision, our task is not to determine if there was sufficient evidence to sustain the council

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[11]The Council heard from: Esther Cooper, MBE owner; Freddie Ray, President of Task Force for Historic Preservation in Minority Communities; Stephen Watts, attorney representing Associated General Contractors of Virginia; Richard Beck, president of a local plumbing contractors' association; Mark Singer, from the electrical contractors' association; Patrick Murphy, American Subcontractors Association; Al Shuman, Professional Estimators Association. In the debate on the ordinance, opponents contended that there was an insufficient number of minority contractors to operate the Plan as proposed, and that implementation of the Plan would lead to inflated bids and would not be conducive to top quality work. Proponents of the Plan, including members of the council, emphasized the history of discrimination in the construction industry, the current difficulties encountered by MBEs in the Richmond area, and the success of similar set-aside programs in other parts of the country. Hearing on Adoption of Minority Business Utilization Plan, Richmond City Council, April 11, 1983.

majority's position in any traditional sense of weighing evidence. Rather, it is to determine whether "the legislative history ... demonstrates that [the council] reasonably concluded that ... private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." Fullilove, 448 U.S. at 503, (Powell, J. concurring). Considering the total information available to the council, we think its conclusion was reasonable.[12] In short, in our view, the information considered by the Richmond City Council, gathered and demonstrated through the public hearing and study, was adequate to ensure that the Plan was adopted to remedy the effect of past discrimination rather than advancing one group's interest over another.[13]

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[12]The Chief Justice thought Congress could take "necessary and proper action" to remedy the effects of past discrimination where "there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities...." Fullilove, 448 U.S. at 475. The Chief Justice observed that, "Congress, after due consideration, perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity. In this effort, Congress has necessary latitute to try new techniques...." Id. at 490. Justice Powell's standard for review of legislative fact-finding is stricter, requiring that a congressional finding be "reasonable." Id. at 503 n.4. Because the Richmond Plan satisfies the stricter test, we need not decide which, as a general rule, would be the more appropriate test.

[13]As we have stated, the council's findings are supported by more than bare statistics. It is, therefore, unnecessary to address the question of whether statistical evidence alone is sufficient to provide factual underpinnings for implementation of a set-aside program. Compare Janowiak v. City of South Bend, 750 F.2d 557, 563 (7th Cir. 1984) (statistics alone insufficent) with Johnson v. Transp. Agency, 748 F.2d 1308, 1310 n.2 (9th Cir. 1984) (statistical evidence of conspicuous imbalance in workforce adequate).

(c)

The third prong of the Fullilove test is that the program extend no further than the established need of remedying the effects of past discrimination. In applying the third prong, we evaluate the Plan in light of the requirement set forth in the Chief Justice's opinion in Fullilove that the remedy be narrowly tailored to the legislative goals of the Plan. 448 U.S. at 490. We also consider a number of factors identified by Justice Powell in his concurring opinion in Fullilove, such as duration, availability of waiver provisions, relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force, and the effect on innocent third parties. Id. at 510-11, 514.

Croson contends that, even if there were sufficient evidence of past discrimination to justify a remedial plan, the Plan is an overextensive response, not narrowly tailored to accomplish the intended remedial purposes. It argues principally that (1) the 30% set-aside figure is unreasonable, and (2) the Plan lacks an effective waiver provision to protect it against abuses. The district court exhaustively analyzed these arguments and concluded that the Plan was valid, and we agree.

Croson asserts that the district court erred in its assessment of the reasonableness of the 30% set-aside requirement by not comparing the 30% figure to the percentage of MBEs in the area. We disagree. Although there are currently few MBEs in the Richmond area, we think the establishment of a 30% set-aside requirement for a five-year

period, with adequate waiver provisions, is reasonable in light of the undisputed fact that minorities constitute 50% of the population of Richmond.[14] A set-aside limited to the current percentage of minority contractors would offer no remedy to eliminate the continuing consequences of the discrimination which has resulted in the present low level of minority

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[14]Presumably, in its five year period of existence, the Plan will have encouraged a sufficent number of minority businesses that the forces of competition could then rectify the lingering effects of past discrimination. The authorization of the Plan for five years evidences the Council's intention not to give a permanent preference to one racial group, but to offer a narrowly tailored, finite remedy of the current effects of past discrimination. In view of the scope of the problem identified by the City Council, a five year plan is, in our view, unquestionably reasonable. Any new affirmative action plan enacted after that time would be subject to renewed scrutiny through a different glass.

participation in government contracting. In remedying the effects of past discrimination, a set-aside program for a period of five years obviously must require more than a 0.67% set-aside to encourage minorities to enter the contarcting industry and to allow existing minority contractors to grow. See Fullilove, 448 U.S. at 513-14 (Powell, J., concurring) (10% set-aside reasonable, where 17% of the population and only 4% of the contractors were minority group members); Southwest Washington Chapter, 667 P.2d at 1101 (MBE participation goal of 11% set at slightly less than county's minority population held reasonable); Schmidt, 662 F.2d at 559, vacated on other grounds, 457 U.S. 594 (1982), (25% goal reasonable in light of city's 34.5% non-white population; decision vacated for failure to reach merits of state statutory issue prior to

deciding constitutional claim). Common sense dictates that judging the set-aside percentage by reference to the existing small proportion of MBEs in the economy would tend to perpetuate rather than alleviate past discrimination. Such a standard would thwart the Plan's remedial purpose of encouraging the development of minority-owned businesses by providing ample opportunity for MBEs to obtain construction contracts. As Justice Powell noted, the Supreme Court "has not required remedial plans to be limited to the least restrictive means of implementation." Fullilove, 448 U.S. at 508.

Both the Chief Justice and Justice Powell in Fullilove emphasized the importance of waiver provisions in minority set-aside plans. 448 U.S. at 487-89, 514. The Chief Justice recognized that in certain market areas,

grantees would be unable to meet the 10% requirement despite their best efforts. Id. at 488. The Court was also sensitive to the possibility that minority set-asides might prove counterproductive--that rather than rectifying the effects of past discrimination, they might allow MBEs to exploit the remedial aspect of the program by charging unreasonable prices or enable sham minority companies to gain competitive advantages. Id. at 487-88. Courts of appeals responding to Fullilove have also recognized the importance of adequate safeguards designed to avoid future favoritism based on race. See South Florida, 723 F.2d at 853-54; Ohio Contractors, 713 F.2d at 174.

In Croson's argument that the Plan is not narrowly tailored, it generally urges that the council adopted a plan parallel to the one approved in

Fullilove, but without the administrative provisions which shaped the Fullilove plan to its narrow role. Croson alleges that the Richmond Plan contains no adequate waiver provisions to give it relief from its claimed inability to obtain a responsible MBE subcontractor at a competitive price.

The MBE statutory provision approved in Fullilove "outlin[ed] only the bare bones" of a program, but made a sufficient number of "critical determinations" so that Congress could permissibly rely upon "the administrative agency to flesh out this skeleton." Fullilove, 448 U.S. at 468. The structure of the Richmond Plan sufficiently parallels the federal plan to meet Croson's general objections. We believe that the administrative regulations promulgated pursuant to the ordinance provided adequate waiver

procedures to protect the City and non-MBEs from possible abuse of the Plan by MBEs and to provide relief to non-MBEs where the Plan's requirement cannot be achieved. In judging the adequacy of the waiver provision of the Richmond Plan, we note first that for a minority business to be considered under the general procurement ordinance it must be "responsible." The Richmond Plan authorizes the Director of the Department of General Services to promulgate rules which "shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved." Richmond, Va., Code Ch. 24.1, Art. VIII-A(B). Pursuant to this city legislative provision, the Director promulgated "purchasing procedures"[15] and an explanation of the required contract clauses.[16] Among other

things, the "purchase procedure" provides that the appropriate city officer must:

9. Verify that the Minority Business Enterprise (MBE) is a minority-owned and controlled business.

10. Approve or disapprove the apparent low bidder's Minority Business Utilization Form and/or make recommendations for any partial or complete waiver.

11. Disapprovals, or any types of waivers, shall be returned to the Department of General Services accompanied by a written explanation.

12. Return the Minority Business Utilization Form, UP-1 to the Department of General Services with a recommendation for approval, disapproval, partial or complete waiver within three (3) working days.

...

14. Approve or disapprove waiver, if required.

15. Award the construction contract to the lowest responsive and responsible bidder as certified to by the Human Relations Commission as being in compliance with the Minority Business

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[15] Appendix A to this opinion.

[16] Appendix B hereto.

Utilization Plan (ORD. NO. 83-69-59, adopted April 11, 1983).

Purchasing Procedure No. 61, City of Richmond, Minority Business Utilization Plan.

> The "contract clause" instructions provide:
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> To justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises (which can perform subcontracts or furnish supplies specified in the contract bid) are unavailable or are unwilling to participate in the contract to enable meeting the 30% MBE goal.
>
> In the event a bidder is unable to find a MBE to participate in the contract, the bidder shall submit a request for waiver of the 30% MBE requirement within ten (10) days of bid. The bidder shall indicate in the request for waiver what efforts were made to locate a MBE to participate and the names of firms and organizations contacted with reasons for declinations.

Contract Clauses, Minority Business Utilization Plan, ¶D, H.

The Plan's waiver requirements are similar to those upheld in Fullilove.

448 U.S. at 494 (appendix to opinion of Burger, C.J.). A non-MBE may obtain a waiver by showing that it made every reasonable attempt to comply with the 30% requirement, but that a sufficient number of qualified MBEs were unavailable or unwilling to participate in the contract. This procedure enables a non-MBE to seek a waiver where the minority contractor is nonresponsive or irresponsible. Croson failed to make the necessary showing. Judge Merhige determined that Croson had made no allegation to the City that Continental had engaged in "price gouging;" it merely alluded to the fact that Continental's price was "substantially higher" than any other price quotation. Croson, slip opinion at 39. The City considered this complaint and denied the request on this and other grounds. If Croson had attempted to demonstrate that Continental had sought

to charge an improperly high amount, the City would have had to determine the validity of the allegation consistent with the City's obligation to conduct the review process in a thorough and substantive manner. See South Florida, 723 F.2d at 854. Similarly, if Croson had been more diligent in its search for an MBE, its assertion of Continental's untimeliness might have been grounds for granting a waiver. Croson's conduct, however, hardly bolsters its claim of unfair treatment, and the fact that the City considered and refused Croson's request for a waiver does not support its claim of invalidity of the Plan. In sum, we find that the Richmond Plan, as complemented by its administrative procedures, possesses adequate assurances that waivers can be obtained to avoid improper use of the Plan inconsistent

with the purpose of remedying the effects of past discrimination.

Croson finally argues that the Plan lacks an adequate appeal mechanism by which such decisions can be reviewed. In the first place, we have found no authority for the proposition that an appeals procedure is a constitutional requirement for set-aside programs. Assuming such a requirement, however, we think the City's procedure is adequate. The City provides a method by which a disappointed bidder may protest an award or a decision to award a contract. See Richmond, Va. Code Ch. 24.1, Art. VII(C). A disappointed bidder not awarded a contract because it failed to obtain a waiver can protest the award under this procedure. In this case, of course, the City decided to re-bid the contract, so there was no award. Absent any showing, however, that the City is wielding its

authority to rebid contracts in order to circumvent the appeals procedure, we see no constitutional defect in delaying the availability of an appeal until after the City actually makes a decision to award a contract.

V.

Croson next contends that even if the Plan facially meets Fullilove standards, the City unconstitutionally applied the Plan to Croson's bid on the City jail project. Croson asserts that the City acted unconstitutionally when it denied Croson's request for a waiver because Continental was "unqualified," its price inflated, and its quotation presented after the bid opening. This action, Croson urges, is a further demonstration that the Plan, if not facially rigid, is made inflexible by the manner in which the City administers the Plan and that the very arbitrariness of

the City's action makes the program unconstitutional as applied to it.

In the first place, a review of the evidence reveals that Continental was qualified to provide the fixtures called for in the contract. Continental appeared on the state listing of MBEs that performed plumbing work and Rose, the Acorn Manufacturer's representative, authorized Continental to be a distributor of Acorn products. The district court found that the price quoted by Continental, though somewhat higher than other quotations, was not so high as to indicate that Continental was taking advantage of the Plan. In reviewing the City's action to see if it acted arbitrarily, we, of course, view all the circumstances upon which it based its decision. No searching inquiry is necessary to reveal Croson's less than exemplary attempts to comply with the

requirements of the Plan. According to its own records, its attempt to engage an MBE consisted of telephone calls to six minority businesses in one ten-minute flurry of activity and equally ineffective follow-up procedures. One of these MBEs denied talking to Bonn. Two others testified that Bonn ignored their specific request for follow-up information to allow them to bid. They also testified that they likely would have provided quotations if Bonn had been serious in his approach. Finally, in light of Bonn's continuing efforts to obtain a waiver though fully aware of Continental's ongoing efforts to submit a quotation, the record hardly supports a conclusion that Croson gave the Plan a chance to work as it was designed. The district court found the Plan facially sufficient. We agree. The district court likewise could find no way in which

this facially sufficient Plan was unconstitutionally applied to Croson. Nor can we. We do not address Croson's other conclusory attacks on the Plan made without supporting argument.

VI.

The City appeals the district court's denial of attorney's fees under 42 U.S.C. § 1988. Finding that Croson's action was not palpably "vexatious, frivolous, or brought to harass or embarass the defendant," Hensley v. Eckerhart, 461 U.S. 424, 429 n.2 (1983), we affirm the district court's denial of attorney's fees.

For the foregoing reasons, the decision of the district court is

AFFIRMED.

APPENDIX A

PURCHASING PROCEDURE NO. 61
Minority Business Utilization Plan

Under City Ordinance No. 83-69-59, adopted April 11, 1983, the Director of General Services is authorized to develop the policies and procedures for implementation of the City's Minority Business Utilizatin Plan. The procedures outlined below shall be followed when developing a construction contract for the City of Richmond:

RESPONSIBILITY

Using Agency

(Dept. of Public Works and

Dept. of Utilities only)

ACTION

1. Determines whether the proposed contract falls within the definition of a construction contract as defined below.

   Definition: Building, altering, repairing, improving or demolishing

any structure, building or road, street, or highway, and any draining, dredging, excavation, grading or similar work upon real property.

2. Provided that the contract is a construction project, include the contract clauses - Minority Business Utilization Plan and the Minority Business Utilization Plan Commitment Form, UP-1, (3 green pages) in the bid package. Indicate in the Notice to Bidders section of the bid package, that, this is a construction contract which is governed under the provisions of City Ordinance No. 83-69-5 adopted April 11, 1983.

Department of General Services

3. For construction contracts for agencies other than the Department of Public Works and the Department of Public Utilities, accomplish the

tasks indicated in paragraphs 1 and 2, above.

4. After the bid opening, assure that all invitations for bids submitted for construction projects as defined in paragraph 1, above, contains a Minority Business Utilization Commitment Form, UP-1. If the Minority Business Utilization Commitment Form, UP-1 is missing, or is incomplete, request the contractor who appears to be the apparent low bidder to complete his Minority Business Utilization Form and advise the contractor that he/she has ten (10) days from the date of the bid opening to return the completed form, naming the minority firm or firms to be employed and ownership percentages and specifying the dollar amount and percentage of the contract awarded, by firm(s).

5. Assure that Bid Bond and other bidding requirements have been met by the contractor for his or her responsiveness to the Invitation for Bid.

6. Forward the construction Invitation for Bid package to the Using Agency for recommendation and review.

7. Refer the apparent low, responsive, bidder's Minority Business Utilization Form, UP-1, or Request for Waiver, to the Human Relations Commission, who shall:

Human Relations Commission

8. Review the Minority Business Utilization Form to certify that the contractor plans to subcontract out thirty percent (30%) of the dollar amount of the contract.

9. Verify that the Minority Business Enterprise (MBE) is a minority-owned and controlled business.

10. Approve or disapprove the apparent low bidder's Minority Business Utilization Form and/or make recommendations for any partial or complete waiver.

11. Disapprovals, or any types of waivers, shall be returned to the Department of General Services accompanied by a written explanation.

12. Return the Minority Business Utilization Form, UP-1 to the Department of General Services with a recommendation for approval, disapproval, partial or complete waiver within three (3) working days.

<u>Department of General Services</u>

13. Review the recommendations from the Human Relations Commission and the Using Agency to resolve all nonconcurrences, if required.

14. Approve or disapprove waiver, if required.

15. Award the construction contract to the lowest responsive and responsible bidder as certified to by the Human Relations Commission as being in compliance with the Minority Business Utilization Plan (ORD. NO. 83-69-59, adopted April 11, 1983).

Using Agency

16. The Using Agency and the Human Relations Commission shall have the responsibility of monitoring the contractor's adherence to all of the contract provisions to include the Minority Business Utilization Commitment. Any discrepancies found shall be reported in writing to the Department of General Services.

APPENDIX B

CONTRACT CLAUSES

MINORITY BUSINESS UTILIZATION PLAN

THIRTY PERCENT (30%) AWARD REQUIREMENT FOR CONSTRUCTION

A. Pursuant to Ordinance No. 83-69-59 of the City of Richmond, all construction contracts shall provide for at least thirty percent (30%) of the contract amount be awarded or subcontracted to Minority Business Enterprises (MBE).

B. The bidder agrees that a minimum of thirty percent (30%) of the dollar value of any resulting contract shall be awarded or subcontracted to minority-owned businesses, contractors or subcontractors. The bidder further agrees that by signing this bid, he/she shall provide all of the information required as indicated on the Minority Business Utilization Plan Commitment Form, UP-1, dated

July 12, 1983. The bidder also agrees that he/she shall complete the aforementioned form, naming the MBE to be employed and its ownership percentages in addition to the dollar amounts and percentage of the contract awarded to such MBE within ten (10) days from the bid opening date. If the Minority Business Utilization Plan Commitment Form, UP-1 is not received by 5:00 p.m., of the 10th day following bid opening (or first business day thereafter, if the 10th day falls on a non-working day), then the award shall be cancelled and the City shall reconduct the award procedure as if bids were just being opened. The contractor who failed to arrange his commitment to a MBE during the 10-day grace period, shall be deemed to be in non-compliance with the terms of

the bid until and unless it is determined that no other bidder could comply with the MBE requirement and compliance thereto is waived by the City.

C. Contractors or proposed bidders may contact the Metropolitan Business League, phone number (804) 649-7473, the Human Relations Commission, phone number (804) 780-4111, Richmond Redevelopment and Housing Authority, phone number (804) 644-9881, State Minority Business Enterprise Office, phone number (804) 786-5560, or the Department of General Services, phone number (804) 780-6124, for assistance in locating a MBE to participate in this contract.

D. No partial or complete waiver of the foregoing requirement shall be granted by the City other than in exceptional circumstances. To

justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises (which can perform subcontracts or furnish supplies specified in the contract bid) are unavailable or are unwilling to participate in the contract to enable meeting the 30% MBE goal.

E. If it appears that less than 30% of the contract funds or whatever lower percentage has been authorized by waiver will be expended to a MBE, this contract shall be suspended or terminated unless a waiver is granted.

F. By execution of the contract, the contractor agrees to cooperate with the City by providing data on MBE

utilization during the full period of the contract.

G. Failure to comply with these terms or use the MBE (or as may be modified by a waiver) as stated in the contractor's assurance shall constitute a breach of contract.

H. In the event a bidder is unable to find a MBE to participate in the contract, that bidder shall submit a request for waiver of the 30% MBE requirement within ten (10) days of bid. The bidder shall indicate in the request for waiver what efforts were made to locate a MBE to participate and the names of firms and organizations contacted with reasons for declinations.

I. No work covered under the terms of the contract shall begin until the minimum 30% award requirements has

been met or a written waiver granted by the City has been issued.

WILKINSON, Circuit Judge, dissenting:

Though the Supreme Court has not proscribed all preferences, its decisions have recognized the dangers inherent in the classification of American citizens on the basis of their race. To protect against such dangers, the Court has directed that the remedy of racial preferences be dispensed only under strict conditions. Here the majority simply disregards the need for such conditions. It abandons the caution required by Supreme Court precedent and issues what amounts to an invitation to the uninhibited and ill-considered enactment of racial distinctions in local ordinances across the land. I cannot support such encouragement--either by this Court or by local authorities--of classifications shown throughout the history of this country to have the

frequently-realized potential for social division and individual injustice.

I do not question for an instant the desirability of increased participation of minority business enterprises in the field of public contracts. Hasty formulas, however, only replicate the discrimination they purport to remedy and balkanize the body politic along lines of natural origin and race. The program adopted by the City of Richmond runs afoul of the boundaries within which racial preferences may be pursued. Its set-aside ordinance is defective in at least two respects.

First, the city is simply unauthorized under Virginia law to enact an ordinance of this type. The sole potential source of state authority -- allowing municipalities to enact procurement policies consistent with "competitive principles" -- is directly

contrary to the existence of a power to enact racial set-asides. It stretches the imagination to conclude that a dispensation of preferment on a basis wholly unrelated to performance or cost is consistent with competitive principles. Moreover, within the context of competition, this ordinance establishes an especially egregious regime of racial discrimination. Unlike other set-asides, it does not require minority subcontractor participation in all contracts, but draws further racial classifications by requiring only non-minority prime contractors to abide by its strictures.

Second, the factual findings made by the Richmond city council are woefully inadequate, as a matter of federal law, to ensure that the ordinance does more than "merely express [] a . . . desire to prefer one racial or ethnic group over

another." Fullilove v. Klutznick, 448 U.S. 448, 497 (Powell, J. concurring). The findings made here pay scarcely more than lip service to the indispensable preconditions for racial preferences by government. They neither support a conclusion of discrimination nor suggest the boundaries for a remedy were the need properly established. If we uphold a racial preference built on a foundation so infirm, we have in effect dispensed with the requirement for any findings at all. Local authorities need only recite an approved purpose and their racial preference will stand. I would have thought it obvious that even the best intentions of lawmakers, standing alone, are inadequate to ensure that preferences do not, in fact, diminish the dignity that resides within all individuals regardless of their race.

I

It is clear that Virginia law limits the powers of local authorities to enact racial set-asides in public contracts. This Court is duty-bound to consider and abide by those limits. See Schmidt v. Oakland Unified School District, 457 U.S. 594 (1982). We do not write on a clean slate of state law, for Virginia has made clear both the severity of its limitations on municipal authority and the centrality of its concern for competition in public contracts. The putative grant of local authority here is the power to enact procedures of procurement "based on competitive principles." Va. Code § 11.35(D). The set-aside, however, introduces into the procurement process a factor wholly irrelevant to competitive concerns -- the racial status of those who own or control a particular business. To equate, as

does the majority, the race-neutrality of competitive contracting with the race-consciousness of numerical set-asides is to disregard principles of competition and flout settled Virginia law.

The majority misapprehends the relationship between state and local government in Virginia. The Dillon Rule limits the powers of local governing bodies to "those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensible." Board of Supervisors v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975). See 1 J. Dillon, Commentaries on the Law of Municipal Corporations, § 237 (5th ed. 1911). Under this rule, the state legislature is the source of all municipal authority, and its grants of authority are to be narrowly construed.

Despite the dilution of the Dillon Rule in other jurisdictions, Virginia continues to follow it closely. See County Board v. Brown, ____ Va. ____, 329 S.E.2d 468 (1985). The General Assembly refused to follow the recommendation of the Commission on Constitutional Revision that the rule be reversed. Instead, the Assembly deleted the proposed repeal of the Dillon Rule from the revised state constitution. See Horne, 215 S.E.2d at 456; Spain, The General Assembly and Local Government: Legislating a Constitution 1969-70, 8 U. Rich. L. Rev. 287, 403-04 (1974).

The force of the Dillon Rule in Virginia is evident from the strictness with which it is applied. Absent an express grant of the specific power in question, the Supreme Court of Virginia rarely upholds local authority to exercise the power. See e.g., Brown, 329

S.E.2d 468 (authority to lease "unused" county land does not allow locality to lease parking lot to a developer); Tabler v. Board of Supervisors, 221 Va. 200, 269 S.E.2d 358 (1980) (authority to regulate trash does not allow locality to require deposits on disposable containers); Horne, 215 S.E.2d 453 (authority to require subdivision plat approval does not allow locality to suspend filing of applications for such approval).

The Supreme Court implies local power only where an express power would be rendered ineffective absent the implication. See e.g., Gordon v. Board of Supervisors, 207 Va. 827, 153 S.E.2d 270 (1967) (authority to create commission to develop airport necessarily includes power to lend money to commission because without such power, commission would be rendered ineffective); Light v. City of Danville,

168 Va. 181, 190 S.E.2d 276 (1937) (authority to build dam necessarily includes power to condemn land for that purpose). It does not imply grants of power to localities on matters of public policy as sensitive and controversial as that in issue here. See Commonwealth v. County Board, 217 Va. 558, 232 S.E.2d 30 (1977) (authority to bargain with public employee union not implied from power to enter into contracts, to hire employees, and to fix terms and conditions of employment). And it would never imply a grant of municipal power in the face of such strong statutory language to the contrary.

Against this backdrop of restrictive state law, the majority's implication of the city's power to enact a racial set-aside is simply untenable. The majority does not contend that the power to adopt this program is expressly

granted by the Virginia Public Procurement Act. Instead, it concludes that the power is "fairly implied" from the grant of authority to base procurement policies "on competitive principles." Far from being implied, however, the exercise of local authority here contradicts the state requirement. The power implied by the majority, consequently, finds its source in sheer judicial fiat rather than in state law.

Though the Virginia Supreme Court has not to date addressed the meaning of "competitive principles" as used in the Virginia Public Procurement Act, the term can hardly be obscure, especially in the context of competitive bidding for public contracts. The General Assembly has defined the term in the procedures it requires for municipalities that do not adopt their own procurement programs. The Assembly values fair and open bidding

on terms of price and quality in the hope that public projects will be awarded to competent contractors at the lowest price possible.

The Assembly's view of "competitive principles" is evident in its statement of general policies regarding procurement. The statement reflects a concern for equality of treatment for all contractors, and a distate for arbitrary exclusions unrelated to the cost and quality of goods and services:

> To the end that public bodies in the Commonwealth obtain high quality goods and services at reasonable cost, that all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded, it is the intent of the General Assembly that competition be sought to the maximum feasible degree, that individual public bodies enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition,

> that specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor, and that purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered.

Va. Code § 11-35.G (emphasis added).

The specific details of the state procurement plan implement its guiding principle, the achievement of high-quality, low-cost public projects. "Competitive sealed bidding" includes at least five elements: 1) written invitations to bid including specifications and contract terms, 2) public notice of the invitation to bid, 3) public opening and announcement of all bids received, 4) evaluation of bids based on requirements found in the invitation, and 5) award of the project to the lowest responsible and responsive bidder. Va. Code § 11-37. These requirements are, of course, familiar in the context of public contracts, for

their beneficial effects are well-established and widely desired.

The state's own program for local procurement therefore suggests a meaning of "competitive principles" consistent with the plain meaning of the term: a process in which every able entrant participates freely, with the yardsticks of performance being the lowest cost for the best quality. There is no hint that the state meant to employ the city's conception of competition -- one that apportions success on the basis of race.

The state, of course, was not blind to the need for minority business participation, but the way it chose to pursue that goal is revealing. It requires those municipalities following its procedures to include minorities in any direct solicitation of bids, Va. Code § 11-37, and has a general policy of encouraging minority participation in a

way "consistent with all other provisions of this chapter." Va. Code § 11-48. There are no numerical set-asides of contract or subcontract awards, but instead a general policy of encouraging minorities to enter the competitive process.

The Richmond plan, by contrast, is not an invitation to compete but a promise of preferment. It introduces into the otherwise cost- and quality-conscious system a factor wholly extraneous to those concerns. Able entrants in the market for subcontracts are denied the right to compete on equal terms. Results are predetermined in a way that does not comport with savings in the public fisc or quality in the public product.[1]

One cannot equate the Virginia requirement of "competitive principles" with "monopoly privileges in a . . .

market for a class of investors defined solely by racial characteristics." Fullilove, 448 U.S. at 532 (Stevens, J., dissenting). Here, the city of Richmond has granted minority subcontractors at least oligopoly power in 30% of all subcontracts let by non-minority prime contractors. Even a limited grant of monoply power to those not necessarily best qualified to perform a contract has adverse consequences. First, because those with such privileges have "the power to control prices or exclude competition," United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391

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[1] In contrast to the basis of authority found here, the court in South Florida Chapter of the Associated General Contractors of America v. Metropolitan Dade County, Florida, 723 F.2d 846, 852 (11th Cir.), cert. denied, ____ U.S. ____, 105 S.Ct. 220 (1984), found local authority based on a provision that allowed the waiver of competitive bidding. No such authority exists here to justify the set-aside.

(1956), monopoly power results in higher prices than those that would prevail under competition. See generally, F. Scherer, Industrial Market Structure and Economic Performance 14-16 (2d ed. 1980); P. Samuelson & W. Nordhaus, Economics 511-16 (12th ed. 1985). Second, the exercise of monopoly power may result in smaller output of a product than a competitive market would realize. See generally, J. Robinson, Economics of Imperfect Competition, 143-154 (2d ed. 1969). Samuelson & Nordhaus, supra at 518. These effects combine to produce a net social loss and a decline in aggregate welfare due to efficiency losses associated with monopoly power. Scherer, supra, at 459-74; Samuelson & Nordhaus, supra, at 518-19.

The facts of Croson's case illustrate vividly the adverse effects of a set-aside program that would not occur

if the city adhered to the state requirement of competitive principles. Croson in effect faced a set-aside far greater than 30%, for the supply of plumbing fixtures represented approximately 75% of the cost of the total project. Croson was obliged, therefore, to award this subcontract to a preferred subcontractor to meet the 30% set-aside. The minority subcontractor's price for the plumbing fixtures ($96,677.14) was $6,183.29 higher than the competitive market price ($90,493.85). This would represent nearly a 7% increase in the cost of these items. If Croson had bid the job using this figure, additional overhead and bond expenditures would have brought the extra cost from using the MBE to $7,663.16. Limited public funds would thus be used on a project actually requiring a much lesser expenditure, and alternative

projects -- desirable and achievable in a competitive market -- would be foregone or delayed.

The district court believed that "Croson's experience . . . establishes that the city considers it immaterial that an MBE provides a somewhat higher price than non-MBEs." It rejected the argument that "any measure that may increase the cost of a contract to the city in the short run" was inconsistent with "competitive principles" by pointing to other state requirements, such as bonding, that increase costs. Set-asides, however, are quite distinct from other cost increasing measures. Racial set-asides introduce into the process a factor far removed from the business concerns that prompted a requirement for such measures as bonds that serve to insure completion of contract work. In addition, other items

that increase costs are, consistent with the Dillon Rule, specifically authorized by the state. Bid bonds, performance bonds, and payment bonds, for example, are authorized by Va. Code §§ 11.57, 11.58, 11.61 and 11.62. Absent such authorization, there would be a serious question as to the authority of municipalities to adopt these requirements. See e.g., Tabler, 269 S.E.2d 358; Horne, 215 S.E.2d 453.[2]

[2] The majority's conjecture that the set-aside will increase competition in the long-run is unavailing. It suggests, paradoxically, that we encourage competition by use of non-competitive devices which may soon be removed, leaving those aided by such devices to confront full competition for the first time. In any event, we need not speculate about such outcomes, for the question is simply foreclosed as a matter of state law. The state has not sanctioned the abandonment of settled, commonly understood principles of competition in public contracts on the majority's surmise. It has required, instead, adherence to competitive principles throughout the operation of public procurement programs.

Even if one were to conclude that the city could generally increase costs by taking a factor such as race into account, competitive principles would require at the very least that the city do so in a neutral manner, requiring all contractors to face the same set of increased costs for subcontracting work wherever possible. The city, however, has simply not adopted such a plan. This is evident from the fact that MBE prime contractors are exempted from the MBE subcontracting requirement. These prime contractors, therefore, enjoy a competitive advantage over their non-MBE counterparts because they can compete freely on the market for the lowest priced subcontractors, regardless of racial identity. Richmond City Code, Ch. 24.1, Art. VIIIA(A).

This reliance upon race in derogation of competitive principles is,

in the last analysis, not a matter of market theory. In requiring a competitive system, the Virginia General Assembly did more than adopt an economic view. Strict procedures for competitive bidding have attempted to rid state and local government of the nemesis of kickbacks, rigged bids, and political favoritism that has bedevilled the field of public purchasing and supply almost since the advent of government. Gains in integrity have been tenuous and hard-won. To introduce a new form of favoritism invites renewed manipulations of a process which, to inspire public confidence, must remain even-handed and scrupulously fair. That this step backwards is blessed by a federal court against the aspirations of Virginia law is doubly regrettable.

II

The Richmond city council not only exceeded its authority under state law. It also failed to abide by the requirements of federal law when it enacted this set-aside. It is, of course, true that the Supreme Court has yet to articulate definitive standards for the review of such racial classifications under the equal protection clause. See e.g., Fullilove, 448 U.S. 448 (1980); University of California Regents v. Bakke, 438 U.S. 265 (1978). Few would deny, however, that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." Fullilove, 448 U.S. at 491 (Opinion of Burger, C.J.). Here the majority abdicates that responsibility by allowing a racial

preference to stand on only the barest of public records.

The need for findings prior to enactment of a racial preference is threefold. Substantial factual findings are necessary to determine whether the purported remedy is indeed aimed at past discrimination or actually represents a bald racial preference. See Fullilove, 448 U.S. at 498 (Powell, J., concurring). Secondly, a court can determine that the remedy is strictly tailored to the scope of the violation "only if it is certain that the persons shaping and implementing the plan understood the nature and extent of the past discriminatory practices." Valentine v. Smith, 654 F.2d 503, 508 (8th Cir.) cert. denied, 454 U.S. 1124 (1981). Thirdly, substantial findings protect against the casual use of racial distinctions and remind a public body of the seriousness of the step it is set to

undertake. None of these vital purposes is served by the meager findings of the Richmond City Council in this case.

The majority's attempt to label the findings in this case as legislative and hence all but immune from judicial scrutiny simply leaves localities unrestricted in enacting public distinctions based on race. Nothing the Supreme Court has said can be construed to give localities such license in this most sensitive of all constitutional arenas. Indeed, local bodies seeking to enact set-asides bear a heavier burden of justification than that required of Congress in Fullilove, and therefore must make more specific findings of discrimination before adopting racial preferences. See Fullilove, 448 U.S. at 515-16 n. 14. (Opinion of Powell, J.). Localities do not possess the unique remedial powers of the Congress over

section 5 of the Fourteenth Amendment. See id., 448 U.S. at 483-84. (Opinion of Burger, C.J.). Accordingly, they may act only in response to well-established violations of well-defined extent. Moreover, when localities adopt set-asides, it is not always clear that a majority is acting on behalf of a minority rather than in its own favor. It is heartening that many localities are now governed by members of minority communities. At the same time, enactment of set-asides in this context may represent abuse of the political process rather than remedial action to benefit true minority interests. See generally, Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723 (1974).

A.

The sparse inquiry of the Richmond City Council simply failed to adduce the

significant and detailed evidence of past discrimination on which courts have conditioned use of remedial racial classifications. See Janowiak v. Corporate City of South Bend, 750 F.2d 557, 561 & 564 (7th Cir. 1984) petition for cert. filed, 53 U.S.L.W. 3896 (U.S. June 10, 1985) (No. 84-1936); South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, 723 F.2d 846, 851-53 (11th Cir.), cert. denied, ____ U.S. ____, 105 S.Ct. 220 (1984); Valentine, 654 F.2d at 508. Though the council adopted the set-aside plan after a public hearing, the paucity of the evidence adduced by this hearing suggests that the council performed only the most cursory inquiry into the necessity of a program for which the constitution requires searching examination.

Only seven speakers addressed the council in the most general terms during its consideration of the set-aside at the very end of a five hour council meeting. Two spoke in favor of the plan, while five opposed it. The city manager and a city councilman stated in conclusory fashion that there was discrimination in the construction industry, though the city attorney specifically denied that the city had discriminated in any individual case in the past. Several council members referred to a study purporting to show that only.67% of the city's $124 million in construction contracts from 1978-83 had gone to minority firms. The record reveals, however, that this "study" is merely a list of city contracts without any reference whatsoever to the racial identity of any contractors. In fact, the city manager testified that overall

minority participation in city contracts was 7-8%.

To uphold a racial distinction on this record makes findings nothing more than a charade to justify a pre-conceived result. The only potentially useful evidence actually before the council was the small percentage of prime construction contracts awarded by the city to minority businesses. Statistics, however, are not self-explanatory. Instead, they function as "warning signals" that "raise questions rather than settle them" and "call for further investigations into the qualitative actions and attitudes that produce the statistical profile." United States Commission on Civil Rights, Affirmative Action in the 1980s: Dismantling the Process of Discrimination 31 (1981). See Johnson v. Transportation Agency, 748 F.2d 1308, 1319 (9th Cir. 1984) (Wallace,

J., concurring in part, dissenting in part). Where the need to show actual discrimination is so great, statistics cannot be invoked as a convenient "short-cut around the critical need for causal evaluation and analysis." Johnson, 748 F.2d at 1319. Because statistics always require inquiry and explanation, "evidence of statistical disparity alone fails to prove past discrimination and cannot justify the adoption of a remedial plan that may discriminate against non-minorities." Janowiak, 750 F.2d at 564.

The majority, however, fails to recognize that statistical disparity suggests only the need for an inquiry, not the end of it. Though statistical disparity is consistent with a conclusion of past racial discrimination, it may also be the product of other factors. See e.g. Milliken v. Bradley, 418 U.S. 717,

756 and n.2 (1974) (Stewart, J., concurring). In particular, the availability of minority firms to perform quality work at a competitive cost must be examined. The failures of city council or prime contractors to make awards to non-existent or non-competitive concerns is more deeply regrettable than it is discriminatory. Such a finding would not support an imposition of the present competitive disadvantage on non-minority primes and subs that neither participated in nor benefitted from any prior malefaction.[3]

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[3] Though the majority attempts to excuse the threadbare nature of the Richmond findings by an argument of "incorporation by reference," we cannot simply assume, absent significant inquiry, that evidence relied on by Congress to adopt a national program supports the addition of another layer of racial preferences in this particular locality. If the broad congressional findings were crucial in supporting local set-asides, there would be little reason for judicial review of these set-asides at all. Courts have, however, felt a need to examine the set of findings in the particular locality. See e.g., Dade County, 723 F.2d at 853.

The cases upholding racial preferences present a dramatic contrast to the sparse evidence relied upon here. In Dade County, for example, the municipality's conclusion of past discriminatory practices rested not only on statistical disparity but also on evidence of "identified discrimination," 552 F.Supp. 925-26, verified by independent investigations and extensive factual findings. In Bratton v. City of Detroit, 704 F.2d 878 (6th Cir.) vacated and remanded on other grounds, 712 F.2d 222 (6th Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 703 (1984), the "inference" of intentional discrimination that arose from severe statistical disparity was supported with detailed evidence of intentional discrimination in the relevant employment context. The conclusion was further bolstered by "numerous independent studies." See id.

at 889. No such evidence was considered here; the Richmond city council relied on raw statistics. Absent further inquiry into the meaning of the numbers before it, the council's action does not proceed from a constitutional or statutory violation and hence lacks even minimal safeguards for adoption of a racial set-aside.

B.

Detailed factual findings are also necessary to ensure that, even where an identified need exists, "the use of [racial] classifications extend[s] no further than the established need of remedying the effects of past discrimination." Dade County, 723 F.2d at 852. Though factual findings alone do not ensure a "narrowly tailored" remedy, Fullilove, 448 U.S. at 490, the absence of such findings makes it impossible to limit the remedy appropriately, for there

is no evidence of the scope of past discrimination at which the program is aimed. A court can determine that the remedy substantially furthers its asserted purpose only if it is certain that the persons enacting the remedy know what it was they intended to redress. See Valentine, 654 F.2d at 508. The deficiencies in the record in this regard are even more glaring than the failure to identify the discriminatory predicate.

First, the only potential evidence of past discrimination considered by the city council was unrelated to the remedy actually adopted. The evidence of statistical disparity involved the percentage of prime contracts awarded to minority businesses by the city. In response to this evidence, the council enacted a set-aside that required increased use of minorities in subcontracts. Council, however,

considered absolutely no evidence on the minority subcontractor market. The district court essentially allowed the council to assume discrimination against minority subcontractors from evidence of minority prime contractor underrepresentation. Yet it is just such offhanded reliance upon racial assumptions that the requirement of findings is designed to inhibit. Though the two situations may be related, nothing before the council demonstrated that this was so. The nexus between violation and remedy was thus left to conjecture in violation of controlling Supreme Court precedent. See Firefighters Local Union No. 1784 v. Stotts, ____ U.S. ____, 104 S.Ct. 2576, 2588 (1984); Dayton County Board of Education v. Brinkman, 433 U.S. 406, 419-20 (1977); Milliken, 418 U.S. at 738; Swann, 402 U.S. at 16.

Second, the 30% set-aside goal emerges from a vacuum. Rather than a goal narrowly tailored to meet a specific need, the 30% figure is arbitrary and unsupported. No consideration was given, for example, to the number of minority firms available to perform contracts under this set-aside, despite the testimony of several witnesses before the city council that the set-aside goal was unrealistic. Though the waiver provisions may temper to some extent the quota, they do not absolve the city council of its responsibility to ensure that the goal chosen relates to demonstrated availability and need. Legislative bodies may not rectify arbitrary action through waiver provisions for which no guidelines or standards are even suggesed. See Richmond City Code, Ch. 24.1, Art. VIII-A(B). The absence of any support

for the percentage figure in the set-aside enhances the danger of an overbroad imposition of competitive disadvantage on non-minority contractors.

Finally, the reach of the remedy adopted here bears no relation to any geographical showing of discrimination. MBEs from all over the country may participate in the benefits of the set-aside program, yet no investigation was made as to whether any out-of-state MBEs had ever been subject to discrimination at the hands of public bodies in Richmond. Why an MBE in Pennsylvania should receive a competitive windfall in Richmond is a mystery. Surely the ordinance would have been less arbitrary if it permitted a waiver of the percentage set-aside in the event no minority subs were available in Richmond. See e.g., Ohio Contractors Association v. Keip, 713 F.2d 167, 169 (6th Cir. 1983)

(set-aside limited to minority business enterprises owned and controlled by residents of Ohio). The adoption of a broad remedy for which any affirmative support is lacking imparts a randomness to the identity of victims and beneficiaries that proper findings can do much to alleviate.

Dade County again provides a significant contrast. There, racial preferences are narrowly tailored through a series of specific steps required whenever they are to be employed. No broad remedies were enacted, instead, racial preferences are considered on a project-by-project basis. This consideration occurs in a three-stage administrative review where the whole range of race-conscious remedies -- including recruitment for competitive bidding -- may be considered. In no case may a set-aside be used unless three

certified minority contractors are available. Finally, the entire scheme of considering race-conscious remedies is subject to annual review and assessment to determine its continuing desirability. See, Dade County, 723 F.2d at 853-854. Not a one of these ameliorating features appears in the Richmond ordinance.

IV

My intention is not to find petty fault or to demean the generous impulse from which remedial preferences spring. This question is not an easy one, and the Supreme Court has struggled to reconcile the American belief in the primacy of the individual with the need to overcome a legacy of discrimination based on race. The court has not forbidden all remedial preferences. Rather it has flashed an amber light. Today the majority ignores that signal of caution. It approves the casual adoption of a crude numerical

preference that can only impair the ideal that all stand equally before the law and postpone the day of human fellowship that transcends race.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

J. A. CROSON COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 84-0021-R
CITY OF RICHMOND,	)	
	)	
Defendant.	)	
	)	
MEGA CONTRACTORS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 84-0022-R
CITY OF RICHMOND,	)	
	)	
Defendant.	)	

ORDER

For the reasons stated in the memorandum this day filed and deeming it proper so to do, it is ADJUDGED and ORDERED as follows:

Judgment be and the same is hereby entered in favor of the defendant, City of Richmond, in each of these causes and

it stands dismissed with its taxable costs.

The motions of the City of Richmond for counsel fees be and they are hereby DENIED.

Let the Clerk send copies of this order and the accompanying memorandum to all counsel of record.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date December 3, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

J. A. CROSON COMPANY, Plaintiff,	)	
v.	)	Civil Action No. 84-0021-R
CITY OF RICHMOND, Defendant.	)	
MEGA CONTRACTORS, INC., Plaintiff,	)	
v.	)	Civil Action No. 84-0022-R
CITY OF RICHMOND, Defendant.	)	

MEMORANDUM

These two cases involve a variety of state and federal challenges, both statutory and constitutional, to a program enacted by the City of Richmond (the City). The challenged program, known as the City's Minority Business Utilization Plan (the Plan), is designed

to increase the participation of minority businesses in construction contracts that the City awards, as a remedial measure for past discrimination against minorities. Plaintiffs, two non-minority contracting businesses, challenge the Plan both on its face and as applied to them.

The complaints in both cases were originally filed in state court, and were removed to this Court pursuant to 28 U.S.C. § 1441(a)--that is, jurisdiction over actions within the original jurisdiction of the federal district court but brought in a state court. This Court has original jurisdiction over the claims in this suit based on violations of federal statutory and constitutional rights pursuant to, e.g., 28 U.S.C. § 1331, and over the state statutory and constitutional claims in this suit

pursuant to the doctrine of pendent jurisdiction.

Defendant moved for partial summary judgment in both cases on the facial validity of the Plan, supported in each case with the same memorandum and materials; plaintiffs filed cross-motions for summary judgment, and, as the defendant did, filed the same supporting memorandum and materials in the two cases. Defendant then filed separate motions for summary judgment in each case with respect to each plaintiff's "as-applied" challenges; each plaintiff responded with a motion for summary judgment on its as-applied claims. After argument on these motions and the taking of ore tenus testimony, the cases are now ripe for disposition on the merits.

I. FACTS

A. The Plan on its Face. The Richmond City Council (the Council)

adopted the Plan on April 11, 1983, after a hearing on the same date.[1] At the hearing was presented a list of the City's construction contracts over the five-year period from 1978 to March 1983, which totaled $124,622,291.61; minority businesses had received only 0.67% of those contracts. The Council recognized that the City's minority population, on the other hand, was on the order of 50%.

The Plan requires all contractors who are awarded construction contracts by the City to subcontract at least 30% of the contract to minority business enterprises (MBEs).[2] Richmond, Va. Code Ch. 24.1, Art. VIII-A(A). The Plan defines an MBE as "a business at least fifty-one percent of which is owned and controlled, or fifty-one percent minority-owned and operated by minority group members or, in case of a stock corporation, at least fifty-one percent

of the stock of which is owned and controlled by minority group members." Richmond, Va. Code Ch. 24.1, Art. I(F)(Part B)(27.10). It defines "minority group members" as "citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." Richmond, Va. Code Ch. 24.1, Art. I(F)(Part B)(27.20).

The Plan is explicitly "remedial" and is to promote wider participation by MBEs as contractors or subcontractors in constructing public projects. Richmond, Va. Code Ch. 24.1, Art. VIII-A(C). The Plan, which became effective thirty days after it was added to the City Code, expires of its own force on June 30, 1988. Id.

The Plan also provides that a waiver procedure be available. Richmond, Va. Code Ch. 24.1, Art. VIII-A(B). It authorizes the Director of the Department

of General Services (DGS) to promulgate the rules governing the waiver procedure, "which...shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved." Id.[3]

> In order for a non-MBE contractor to justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified MBE's (which can perform subcontracts or furnish supplies specified in the contract bid) are unavailable or are unwilling to participate in the contract to enable meeting the 30% MBE Goal.

Contract Clauses ¶D. Non-MBEs are further informed that:

> In the event a bidder is unable to find a MBE to participate in the contract, that bidder shall submit a request for waiver of the 30% MBE requirement within ten (10) days of bid. The bidder shall indicate in the request for waiver what efforts were made to locate a MBE to participate and the names of firms and organizations contacted with reasons for declinations.

Contract Clauses ¶H.

The Plan requires that contractors who purport to comply with the MBE requirements, as well as contractors who request waivers, are subject to review under the Plan. The HRC must verify that any MBE in a contractor's Commitment Form "is a minority-owned and controlled business." Procedure ¶9 (emphasis original). The HRC must return the Commitment Form to DGS, with a recommendation for approval or disapproval. Procedure, ¶12. Disapprovals must be returned to DGS with a written explanation. Procedure, ¶11.

The Plan does not specifically provide for appeal of HRC or DGS decisions concerning requests for waiver or a firm's MBE status. However, once the City has made an award (or decision to award), the City Code's general procurement procedures provide for further review of decisions in the

contract award process. Under the City Code, any "bidder or offeror" may protest the award (or decision to award) by submitting a timely written protest. Richmond, Va. Code Ch. 24.1, Art. VII(C)(1).[4] Any such protest must state the basis and the relief sought. A written decision on the protest must issue within ten days stating the reasons for the action taken. Such decisions are appealable. See id. This protest mechanism thus allows dissatisfied contractors to challenge the approval or rejection of a firm as an MBE, and the approval or rejection of a request for waiver, once the City has made an award or announced a decision to award.

B. The Plan as Applied: Croson.

J. A. Croson Company (Croson) is in the mechanical-,plumbing-, and heating-contracting business. An Ohio corporation licensed to do business in

Virginia, Croson's principal place of business in Virginia is Richmond. Mr. Eugene Bonn is Croson's regional manager in Richmond. Bonn personally prepared all of Croson's bid documents in connection with a project involving the provision and installation of certain plumbing fixtures at the City Jail. Croson's experience with the bidding for that project is the basis of its "as-applied" challenge to the City's Plan. In particular, Croson complains that the City improperly denied its request for waiver of the MBE requirements.

On September 6, 1983, the City issued its invitation to bid on the project. The last day on which a bid could be submitted was October 12, 1983. On or about September 30, Bonn obtained the bid documents. The bid involved stainless steel urinals and water

closets. Products of either of two manufacturers--Acorn Engineering Company (Acorn), or Bradley Manufacturing Company (Bradley) were specified. Bonn determined that the 30% MBE requirement could only be met if the MBE supplied the fixtures.

On September 30, Bonn telephoned several MBEs that were potential suppliers of such fixtures, after contacting three state and local agencies that maintain lists of MBEs. The precise number of those MBEs that Bonn actually contacted on September 30 is unclear: Bonn maintains that he telephoned six, but it appears that he may have contacted only five.[5] Of the six Bonn may have phoned, only one was in Richmond: Continental Metal Hose (Continental). Bonn maintains that he spoke with the president of Continental, Mr. Melvin Brown on that day. Brown, however,

claims that Bonn did not speak to him until the morning of October 12, 1983--the last day on which bids could be submitted.

On the morning of October 12--the last day on which bids could be submitted--Bonn made a second round of phone calls to MBEs. These were the same MBEs Bonn purportedly called on September 30. Although his first round of calls had not yielded quotes or follow-up interest from any MBE, Bonn had better luck in his second round: Brown of Continental clearly did want to participate.

In order to be in a position to participate, Brown called two potential sources of fixtures the same day after speaking with Bonn. One potential source was Ferguson Plumbing Supply (Ferguson), a Richmond supplier that Brown had dealt with previously. Ferguson, which is not

an MBE, had already provided a quote to Croson for the fixtures in the same contract; consequently, Ferguson would not quote to Brown. Brown also contacted directly the agent of one of the two specified fixture manufacturers (Bradley). But Brown was unknown to him, and the agent was not allowed to quote to unknown suppliers until they had undergone a credit investigation. The agent informed Brown that such an investigation would take at least thirty days.

Brown and Bonn met personally the next day, October 13, at the opening of the sealed bids. Croson turned out to be the only bidder, with a bid of $126,530.00. Brown informed Bonn of the problems he had encountered in obtaining a quote for the fixtures, including his lack of credit approval from the Bradley agent. But Bonn encouraged Brown to

continue his efforts to obtain a quote in hopes that Croson would be able to use Continental as an MBE.

Nevertheless, on October 19, 1983, Bonn submitted Croson's request for waiver of the 30% MBE requirement to the City. By that date, Bonn still had not received any quote from Brown, although he knew that Brown remained interested in supplying the fixtures. In Croson's request for waiver, Bonn indicated that Brown was "unqualified." As for the other five MBEs Bonn had contacted, he indicated that they were "non-responsive" or "unable to quote."

Brown did not learn about Croson's request for waiver until about October 27. Upon learning of it, he sought from Bonn the name of the manufacturer's agent for Acorn, the other fixture manufacturer named in the bid specifications. Brown telephoned the agent, Mr. David Rose,

that same day. No credit requirements were discussed, but by October 31 Rose had provided Brown with a quote on the fixtures which Brown supplied Bonn shortly afterwards.

On October 27--the day that he learned about Croson's request for waiver--Brown contacted city authorities, as well as Acorn's representative. He called Mr. Chris Stevens, Director of Purchasing and Stores for DGS, and told Stevens that Continental could provide the fixtures specified in the jail contract. This information was relayed to Vernon Williams, the contract officer who would rule on Croson's waiver request. Williams also found that Continental was listed as an MBE plumbing supplier on a listing maintained by the State. Williams recommended that Croson's request for waiver be disapproved because an MBE was available.

The City informed Croson by letter dated November 2, 1983 that the HRC had "withheld approval" of Croson's request for waiver. The letter indicated that Croson would have ten days to submit a completed Commitment Form, and warned that a failure to do so could result in Croson's bid being considered nonresponsive.

Instead of supplying a completed Commitment Form, Bonn submitted a two-page letter for Croson, dated November 8, 1983, again requesting a waiver. Bonn argued that Continental (the presumably "available MBE"), was not qualified for purposes of the contract, and therefore was not available. Bonn pointed out that according to his own investigations, Continental was not a qualified supplier for either Acorn or Bradley. Bonn asserted that even the quote on the Acorn fixtures that

Continental had obtained was subject to credit approval. Bonn's letter also stated that Brown submitted Continental's quotation to Bonn some twenty-one days after the bid date, and that the quote, when submitted, was "substantially higher" than any other quotation.

Brown gave the City his version in a letter dated November 11, 1983. He asserted, among other things, that Acorn's representative had offered to extend to Brown the necessary credit. Brown also indicated that Bonn had not contacted him until the day that bids were due.

In a letter dated November 16, 1983, Bonn wrote the City documenting the additional costs that would arise if Continental supplied the fixtures, pursuant to the City's request for such information. The documentation showed that using Brown would increase costs by

$7,663.16. Bonn suggested that if the City, who he contended was an unqualified supplier, required Croson to subcontract with Continental, then the contract price would have to be increased accordingly.

Croson's request to have the contract price raised if the fixture work were subcontracted to Continental, as well as Croson's renewed request for a waiver, was denied by the City in a letter from the Director of DGS dated November 18, 1983. The waiver was denied on the grounds that "there does appear to be a minority supplier with the capability to participate in this project." The request to change the contract price was denied "because the City cannot modify a firm fixed price bid submitted for a project." The letter further stated that the City had elected to re-bid the project, and invited Croson to submit another bid.

Almost three weeks later, in a letter dated December 9, 1983, counsel for Croson wrote the Director of DGS requesting to exercise Croson's "right of review." The letter stated that the denial of waiver was arbitrary and capricious, asserting that Continental had delayed unreasonably in submitting a quote, that the quote was unreasonably inflated, and that no manufacturer was committed to honor Continental's quote. In a letter by one of its attorneys dated four days later (December 13, 1983), the City rejected the request for review on the grounds that the City had elected to re-bid the project and there is no appeal of such a decision. Croson commenced this lawsuit shortly thereafter.

C. The Plan as Applied: Mega. Mega Contractors, Inc. (Mega) is a general contractor in the business of highway construction and road-paving.

Mega is a Virginia corporation with its principal place of business in Rockville, a town in the vicinity of Richmond. Mega is not an MBE. Mr. Paul O. Lanier, Mega's president, owns 95% of Mega's stock. The City refused to approve as an MBE a firm, Taylan Construction Company, Inc. (Taylan), that Mega had submitted in its Commitment Form for a street re-surfacing project. The City's refusal to approve Taylan as an MBE gives rise to Mega's as-applied challenge to the City's Plan.

Mega's bid of $484,360.45 was the lowest one the City received. On September 1, 1983 Mega submitted its Commitment Form, which included 2 MBEs, including Taylan. The Commitment Form indicated that Mega would fulfill its 30% MBE requirement by subcontracting 22.9% of the dollar value of Mega's bid to Taylan; and the remaining 7.1% to the

other MBE. The City questioned the MBE status of Taylan.

Taylan is the brainchild of Lanier, Mega's president. Lanier began exploring the idea of setting up an MBE sometime after the City passed its ordinance instituting the Plan. Lanier wanted to establish an MBE in order to facilitate Mega's compliance with minority set-aside requirements. Sometime in July or early August, he spoke with Mr. Harrison L. Taylor, a black man and long-time employee of Mega, about Taylor's possible involvement in such a plan.

Taylor's business background is extremely limited. A Mega employee since beginning as a laborer in 1964, Taylor was a foreman for Mega at the time Lanier contacted him. As a foreman, his work included hiring laborers, truck drivers, and equipment operators. Taylor also maintained time sheets for men working

under his supervision. He had never prepared bidding documents, procured supplies, or engaged in other such business planning activities, and he has no formal educational background in any sort of business matters.

Taylor also had an extremely limited role in the planning and incorporation of Taylor. While Lanier had frequent contact with the attorney who drew up Taylan's corporate documents, Taylor had no such contact. Taylor's only participation was his agreeing to Lanier's general idea of setting up Taylan.

Taylan was incorporated as a stock corporation under Virginia law. As originally created, Taylan had three directors, one of whom was Taylor; however the company was later restructured in October, 1983 to make Taylor its sole director, in an attempt

to secure the City's approval of Taylan as an MBE. Lanier named Taylor as its president. Lanier also selected the other officers of Taylan. When one of those officers, Taylan's first secretary/treasurer, left that position, it was Lanier who named his replacement, although Taylan's by-laws require that its officers be elected by the Board of Directors. Taylan's Board of Directors had not met during any time pertinent to this lawsuit.

Taylor owns 51% of Taylan's issued stock, while Lanier's son owns the remaining 49%. At Lanier's suggestion, Mega financed Taylor's stock purchase in its entirety, with a loan of $6,120. Mega loaned Taylor an additional $7,140 so that Taylan would have the funds required for a Class A license. Taylor pledged to Mega his Taylan stock on August 10, 1983 as security for the note

he gave on the $13,260 loan. The note is payable on demand.

Mega is closely connected with Taylan's day-to-day operations. All of Taylan's assets are cash, and it has no payroll of its own. Both Taylor and Taylan's vice-president, Mr. J. Brent Moore are employees of Mega. Taylor himself has little involvement with Taylan's day-to-day management decisions. It is Moore who prepares Taylan's bids and quotations and handles Taylan's other financial matters. Moore does similar work for Mega, and in fact prepared Mega's bid on the road paving project at the same time he prepared Taylan's quote to Mega for the project. Taylor's own work for Taylan involves supervising fieldwork and hiring and firing employees.

After Mega submitted Taylan as one of its MBEs, the City sought additional

information about Taylan in order to verify the company's MBE status. In a letter dated September 21, 1983, Mr. Vernon Williams, a contract compliance specialist of the HRC, asked Taylor to document several items relevant to Tayla 's MBE status. Those items included Taylan's date of incorporation, incorporators, officers, investors, and number of stockshares issued. Counsel for Taylan responded, submitting the information in a letter to Williams dated September 29, 1983. In a brief letter dated October 4, 1983, Williams advised Taylor that Taylan did not meet the requirement that an MBE must be a minority owned and controlled business. Wiliams did not elaborate.

The City subsequently agreed to reconsider Taylan's MBE status. In support of Taylan's position, counsel for Taylan submitted a letter dated October

24, 1983, indicating that Taylan's corporate structure had been changed so that Taylor was the sole director, rather than one of three directors as before. The letter acknowledged close ties between Taylan and Mega, but noted that such ties between MBEs and non-MBE contractors were not unusual. Taylan's counsel also provided Williams with a "C-109" form, dated October 28, 1983 indicating that--in Taylan's day-to-day management and policy decision-making--Taylor was responsible for financial decisions and management decisions including estimating, marketing and sales, hiring and firing of personnel, and purchases of major items of supplies.

On November 1, 1983, at Williams' request, Williams and Taylor met personally at Williams' office. Williams questioned Taylor about a number of matters relating to Taylan's ownership

and management. Williams learned that Mega had loaned Taylor the money he used to buy his Taylan stock; that Taylor had no business experience; that Taylor's own responsibilities involved only supervising field work and the hiring and firng of personnel; and that Taylor was on Mega's payroll. Williams summarized these observations in a memorandum of the meeting dated November 4, 1983, and concluded that Taylan could not be an MBE because Taylan was not owned and controlled by a minority.

The Director of DGS informed Mega, in a brief letter dated November 2, 1983, that DGS was cancelling its proposed award of contract to Mega on the project because Mega had not satisfied the MBE requirement. Williams, in a letter dated November 7, 1983, informed Taylor that Taylan did not meet the requirement that an MBE be minority owned and controlled.

It is unclear what steps, if any, Mega took to obtain review by the City of the City's decision to deny Taylan's MBE status and cancel Mega's proposed contract. Mega's complaint alleges generally that Mega appealed and that the City refused to consider it. But the record does not reflect any evidence on the issue.

II. Basis for Challenge

Each plaintiff has included eight counts in its complaint; most of the which are identical. The first four counts are state-law causes of action. Count One alleges that the City's adoption of the Plan exceeded the City's powers granted by the state. The second and third counts, now withdrawn, allege that the Plan violates two provisions of the Virginia Code governing government contracting.[6] The fourth count alleges that the Plan violates the Virginia

Constitution, Article I, Section 11, because it discriminates on the basis of race in public contracting.

The last three counts are based on federal law. Count Six alleges that the Plan, both on its face and as applied, violates the due process clause of the Fourteenth Amendment because the Plan discriminates on the basis of race, and further violates 42 U.S.C. §§ 1981, 1983. Count Seven alleges the same with respect to the equal protection clause rather than the due process clause. And Count Eight alleges that the Plan both on its face and as applied, violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

Count Five in Croson's complaint alleges that the HRC's denial of Croson's request for waiver and refusal to allow Croson to appeal that denial, violated Croson's due process rights guaranteed by

Article I, Section 11 of Virginia's Constitution and the due process clause of the Fourteenth Amendment. Count Five in Mega's complaint is different, alleging that the HRC violated the Plan itself by applying an unlawful test of whether a business is an MBE.

III. Discussion

Plaintiffs have already withdrawn two of their claims, as the Court has noted supra. The Court can further simplify the issues before it because plaintiffs have neither argued nor briefed their claim in Count Six, which alleges that, because the Plan discriminates on the basis of race, plaintiffs' rights under the due process clause of the Fourteenth Amendment have been violated. Plaintiff Croson does summarily re-assert, in its Memorandum in Support of Motion for Summary Judgment, that it has suffered a deprivation of

"substantive due process" as well as equal protection because the plan is racially discriminatory. But Croson refers to no case authority in support of its due process claim based on the plan's alleged racial discrimination. To the extent that Croson and Mega meant for their claim in Count Six to mean anything different from their equal protection claim asserted in Count Seven, the Court deems that claim to be abandoned.

A. Authority Under State Law.

The plaintiffs' primary state-law argument is that the Plan was adopted ultra vires, in that the City is without power to adopt a procurement ordinance that incorporates a minority set-aside program such as the Plan. Under Virginia law, the scope of a local government's authority is determined by the "Dillon Rule," which states that "local governing bodies have only those powers that are

expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." Tabler v. Board of Supervisors of Fairfax County, 221 Va. 200, 202, 269 S.E. 2d 358, 359 (1980).

Virginia has not expressly authorized cities to adopt contracting set-aside programs for minorities. But it has expressly authorized the governing bodies of counties, cities, and towns to adopt policies and procedures for the procuring of goods and services. It does so through an exemption to the Virginia Public Procurement Act, Va. Code §§ 11.35 et seq., (Supp. 1984) (the "Act"). The purpose of the Act was to enunciate policies concerning government procurement from nongovernment sources. Va. Code § 11.35(B) (Supp. 1984). The Act sets out a number of specific

provisions addressing several areas of public procurement, including contract formation, payment of bills, and ethics. Local governments that choose to adopt their own procurement policies are generally exempted from the specific provisions of the Act, so long as the policies and procedures that they adopt are "based on competitive principles." Va. Code § 11.35(D)(Supp. 1984).[7]

The City's adoption of the Plan as part of its procurement procedures is not contrary to this general grant of authority to adopt alternative procurement procedures, despite plaintiffs' arguments to the contrary. Plaintiffs contend that the Plan renders the City's procurement procedures inconsistent with "competitive principles." They point out that a prime contractor, in order to fill its 30% MBE requirement, may have to take an MBE

subcontractor whose quote is not the lowest available for some of the contract specifications. Because this may lead in the short run to higher project costs for the City than would otherwise prevail, plaintiffs argue that the City's procurement procedures are not consistent with competitive principles.

The Court rejects this argument. There is no legislative history that provides any clue as to the meaning of "competitive principles," but plaintiffs' reading, in effect, would require that any measure that may increase the cost of a contract to the City in the short run to be deemed inconsistent with "competitive principles." Such a reading of "competitive principles" plainly does not conform to the legislature's intent. Other measures in public contracting, such as requiring bid bonds, performance bonds, and payment bonds, may also

increase the ultimate price of a contract to a local government. Yet such measures are specifically authorized by the State in the Act, see Va. Code §§ 11.57, 11.58, 11.61, 11.62 (Supp. 1984), no doubt because they promote such useful goals as protecting the local government against poor workmanship. The Court cannot agree with plaintiffs that if a measure may increase contract costs, then that measure is necessarily inconsistent with "competitive principles."

Further, under the Plan, there remains every incentive for both MBEs and non-MBEs to compete against one another. The Plan does not alter the fact that, under the City's procurement ordinance, bids are awarded to the "lowest responsive and responsible bidder." Richmond, Va. Code Ch. 24.1, Art. IV, § 14(a). The Plan simply changes the structure of the competition, by

requiring non-MBEs to team up, insofar as possible, with MBEs, to compete for contracts against other teams of non-MBEs and MBEs. In addition, the Plan in the long run may reduce the cost to the City of its construction contracts; after the Plan is concluded, there will probably be more firms competing for the City's business, which may result in keener competition and correspondingly lower prices than would prevail if the Plan had not been instituted. Given all this, the Court cannot find the Plan inconsistent with "competitive principles."

Plaintiffs also argue that the Plan cannot be reconciled with the general grant of authority in Section 11-35(D) because the Plan conflicts with Virginia's public policy. Local ordinances cannot conflict with the public policy of Virginia as embodied in

its statutes. See King v. Arlington County, 195 Va. 1084, 1090, 81 S.E. 2d 587, 591 (1954). Plaintiffs' argument that the Plan contravenes Virginia's public policy is based on Section 11-44 of the Virginia Code. Section 11-44 states, in pertinent part, that "in the solicitation or awarding of contracts, no public body shall discriminate because of the race, religion, color, sex, or national origin of the bidder or offeror." Va. Code § 11-44 (Supp. 1984).[8]

Plaintiffs fail to recognize that the word "discriminate" is not self-defining, especially in the context of legislation addressing race relations. In that context, the word does not necessarily proscribe programs that create preferences for blacks and other groups that have historically been the victims of discrimination. See, e.g.,

United Steelworkers of America v. Weber, 443 U.S. 193, 201-08 (1979) (upholding private program creating race-based hiring preference as consistent with statute making it "unlawful to discriminate...because of race" in employment). Plaintiffs have not adduced any arguments for construing Section 11-44 as prohibiting a minority set-aside program such as the Plan.

Several considerations suggest that the policy embodied in Section 11-44 should be viewed as consistent with the City's Plan, not opposed to it. First, the act of which Section 11-44 is a part includes another section, 11-48, requiring public bodies to establish programs that "facilitate the participation" of minority-owned businesses in procurement. Va. Code § 11.48 (Supp. 1984).[9] Section 11-48 does not, of course, specifically mandate

programs such as the Plan. But it does indicate that a local government's race-conscious efforts on behalf of minorities do not necessarily conflict with Section 11-44. Second, when Section 11-44 was enacted in 1982, it had been recently and clearly established that federal statutes prohibiting racial discrimination do not necessarily prohibit race-conscious programs designed to help groups that have historically suffered discrimination. See, e.g., United Steelworkers of America v. Weber, supra, 443 U.S. 193 (1979). This further suggests that the legislature did not intend for Section 11-44 to prevent a city from adopting a race-conscious preference program: arguably, the legislature would have specifically differentiated its own anti-discrimination law from the federal law on the issue, if it had intended a

difference between the two. In short, plaintiffs have failed to show that the City's Plan conflicts with any public policy embodied in Section 11-44.

Thus, the City's adoption of the Plan as part of its procurement procedures is not outside the general grant of authority in 11-35(D) to adopt alternative procurement procedures that are consistent with competitive principles. In order for the Plan's enactment to satisfy the Dillon Rule, it must also be shown that the City's authority to enact the Plan may fairly be implied. Under Virginia law, questions concerning implied legislative authority of a local governing body are resolved by analyzing the legislative intent of the General Assembly. Tabler v. Board of Supervisors, supra, 221 Va. at 202, 269 S.E. 2d at 360. Powers that the

legislature "clearly did not intend to convey" cannot be implied. Id.

There is nothing suggesting that the legislature "clearly did not intend to convey" the power to enact minority set-aside programs in municipal contracting. Further, the City's authority to enact ordinances such as the Plan can be implied from two sources already discussed. First is Section 11-35(D), which invites local governments to adopt alternative procurement procedures so long as they are consistent with competitive principles. Second is Section 11-48. Section 11-48 requires local governments that do not adopt their own procurement procedures to "establish programs consistent with all provisions of this chapter to facilitate the participation of...minorities in procurement transactions." Va. Code § 11-48 (Supp. 1984).

Plaintiffs argue that Section 11-48 cannot be read to support the set-aside program for minorities such as the City's Plan. They note that Section 11-48 requires any program to be consistent with "all provisions" of the chapter, which thus includes Section 11-44. Plaintiffs argue that Section 11-44 prohibits racial discrimination in public contracting, and that therefore the City's set-aside plan is not consistent with Section 11-44. This argument is flawed, however. As discussed supra in rejecting plaintiffs' contention that the Plan is contrary to the public policy embodied in Section 11-44, Section 11-44 does not prohibit set-aside programs for minorities.

Having concluded that the objection based on Section 11-44 is not well taken, the Court finds that Section 11-48 can be fairly read to authorize set-aside

programs for minorities, so long as such a program is constitutional. This conclusion is buttressed by the fact that such set-aside legislation had already been enacted at the federal level and upheld by the United States Supreme Court when Virginia adopted Section 11-48.[10] In such a context, if the legislature had intended the phrase "programs...to facilitate the participation of... minorities" not to include set-aside programs for minorities, it presumably would have expressed that intent in the statute or in legislative history. Yet, plaintiffs have provided nothing to suggest that the Virginia legislature meant for Section 11-48 to limit local governments to less than what is constitutionally permissible, in terms of adopting remedial programs to facilitate the participation of minorities.

Because the City's power to enact the Plan is not contrary to Section 11-35(D), and because that power may in fact be fairly implied from Section 11-35(D) and Section 11-48, the Court holds that the City's adoption of the Plan was not ultra vires.

B. Virginia Constitution's Prohibition of Racial Discrimination.

The Virginia Constitution states that "the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged." Va. Const. Art. I, § 11. Plaintiffs allege in Count Four that the Plan runs afoul of this state constitutional guarantee. As the parties agree, the Supreme Court of Virginia holds this constitutional provision to be co-extensive with the equal protection clause of the Fourteenth Amendment to the

United States Constitution. Archer v. Mayes, 213 Va. 633, 194 S.E. 2d 707 (1973). Thus, the analysis infra rejecting plaintiffs' Fourteenth Amendment equal protection claim applies to this claim as well.

C. Equal Protection Clause of the Fourteenth Amendment

Plaintiffs base much of their attack against the City's Plan on the equal protection clause of the Fourteenth Amendment. Plaintiffs do not maintain that the equal protection clause prohibits a city from adopting a set of contracting procedures that includes a race-conscious set-aside program. They do argue, however, that the Plan does not comport with the standards that the United States Supreme Court articulated in Fullilove v. Klutznick, 448 U.S. 448 (1980).

In Fullilove, the Supreme Court upheld a minority set-aside program. The United States Congress had established the challenged program through the Public Works Employment Act of 1977. That act included a provision requiring state and local governments that apply for certain federal grants for local public works projects to provide assurances that at least 10% of the grant would be expended through minority business enterprises. A "minority business enterprise" was defined as a business owned by citizens of the United States who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." 448 U.S. at 454. In terms of ownership, the business must be at least 50% owned by minority group members, or if the business is publicly owned, at least 51% of the stock must be owned by minority group members. The statute also provided for administrative

waivers of the 10% requirement in some circumstances.

Although the Supreme Court in Fullilove upheld the statute against the equal protection challenge, no clear, easily-applied test emerged from the decision. The Chief Justice, writing for himself and Justices Powell and White, first examined the purpose of the program. He found that it was remedial, in that it was designed to ensure that grantees under the program would not employ procurement practices that might perpetuate the effects of prior discrimination that had impaired or foreclosed the access of minority businesses to public contracting opportunities. Fullilove, supra, 448 U.S. at 473. He then inquired whether such an objective is within Congress's authority. Id. at 473-480. Finally, the Chief Justice examined the means Congress

had chosen, focusing on whether the means are "narrowly tailored" to achieve the remedial goal. Id. at 480-89. He expressly disavowed the application of traditional formulas of equal protection analysis such as "strict scrutiny" or "intermediate scrutiny." Id. at 492.

Justice Powell wrote a separate concurrence as well, invoking the traditional "strict scrutiny" standard of equal protection. Id. at 507 (Powell, J., concurring). After examining the basis of Congress's authority to adopt the challenged program, Justice Powell inquired whether the racial classification served a "compelling" state interest, and whether the means selected are "equitable and reasonably necessary to the redress of identified discrimination." Id. at 510. In analyzing the appropriateness of the

means adopted, Justice Powell articulated five factors that should be considered.[11]

Justices Brennan and Blackmun, however, joined Justice Marshall's concurring opinion that an intermediate level rather than a strict level of scrutiny is the appropriate standard in reviewing equal protection challenges to programs that employ racial classifications for remedial purposes. Under that standard, such programs would pass muster under the equal protection clause so long as the means chosen are "substantially related" to the articulated remedial purpose. Fullilove, supra, 448 U.S. at 520-21 (Marshall, J., concurring).

A majority of the Supreme Court still have not agreed on the appropriate level of scrutiny for equal protection challenges to such programs. Since Fullilove, the Supreme Court has not

returned to the issue. And in the other leading case in which the Supreme Court addressed the question of the appropriate level of scrutiny for equal protection challenges to race-conscious remedial programs adopted by governmental institutions, Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the issue was similarly unresolved. At issue in Bakke was an admissions program instituted by a state medical school. The program required the school to set aside a certain number of positions in each entering class for minorities. The Court struck down the program in a five-to-four decision. Four justices would have upheld the program, applying an intermediate level of srutiny. Justice Powell, however, applied strict scrutiny and found the program violated equal protection guarantees, while the remaining four

justices declined to reach the constitutional issue and found the program violated statutory requirements.

While fundamental issues pertaining to the equal protection analysis of race conscious remedial set-aside programs remain unresolved after Bakke and Fullilove, a number of courts have had to rule on such challenges in the meantime, especially with respect to programs instituting set-asides in government contracting.[12] Recently the Court of Appeals for the Eleventh Circuit addressed such a program. See South Florida Chapter, n. 12 supra, 723 F.2d 846. After reviewing the Bakke and Fullilove decisions and recognizing the unresolved nature of some of those fundamental issues, the Court articulated a three-part test based on its view of the "common concerns to the various views expressed in Bakke and Fullilove":

> (1) that the governmental body have the authority to pass such legislation; (2) that adequate findings have been made to ensure that the governmental body is remedying the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another; (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination.

Id. at 851-52. The test is a fair synthesis of those concerns, and provides a useful general guideline for analyzing the equal protection issues posed by the City's Plan.

1. The City's Authority to Adopt the Plan.

Plaintiffs argue that the City has no authority, under the laws of Virginia, to adopt the Plan. In disposing of the plaintiffs' claim that the Plan is ultra vires, and therefore void under Virginia law, the Court has already rejected this contention, supra. Plaintiffs have introduced nothing further to support

their contention that the City lacks authority to adopt the Plan in the equal protection context. For the same reasons that the Court rejected plaintiffs' arguments in their state law claims, it rejects those arguments here.

2. Findings That Ensure That the Governmental Body is Remedying Present Effects of Past Discrimination and Not Advancing One Group's Interest Over Another's.

The Richmond City Council made findings sufficient to ensure that, in adopting the Plan, it was remedying present adverse effects of past discrimination in the construction industry. The City Council characterized the Plan as "remedial." See Richmond, Va. Code Ch. 24.1, Art. VIII-A(C). And the evidence before the City Council when it enacted the ordinance supports the conclusion that the participation of

minority businesses in the Richmond area construction industry in general, and the City's construction contracting in particular, continues to be adversely affected by past discrimination. Such evidence confirms the Plan's remedial goals.

It was established at the hearing that there were enormous disparities between the percentage of construction contracts awarded to minority businesses (0.67%) and the percentage of minorities in the Richmond population (about 50%) over a five-year period from 1978 to 1983. See Transcript of Hearing at 13, 49. It was also brought out at the hearing, by representations of a number of construction trade associations, that there were very few minority businesses in the construction industry at all. It was further stated by a city councilman and by the city manager that there was

discrimination and exclusion on the basis of race in the construction industry, in both Richmond and the state. There were a number of representatives of contracting associations present at the hearing, none of which denied this claim--although some of them asserted that their own organizations did not discriminate on the basis of race.

In addition to the evidence elicited at the hearing itself, the City Council enacted the Plan with Congress having already extensively documented the fact that low levels of minority business participation in the construction industry in general and government contracting in particular reflect continuing effects of past discrimination. See Fullilove, supra, 448 U.S. at 465-67 (reviewing extensive Congressional findings). This evidence, too, supports the conclusion that the

documented minimal participation of minority businesses in the City's construction contracting reflects past discrimination against minorities in the construction industry. Cf. Southwest Washington Chapter, n. 12 supra, 667 P.2d at 1100; (county council entitled to rely to some extent on more general national findings underlying federal laws).

Plaintiffs argue that the City's findings are deficient in at least two respects. First, they point out that the City failed to determine the precise percentage of minority contractors actually in the Richmond area. Although they cite no cases on point, plaintiffs apparently believe that the City is obliged to compare the proportion of its construction contracts awarded to minorities with the proportion of minority construction contractors in the area, rather than with the area's

minority population. Their belief appears to be based on the assumption that the evidence supporting findings of discrimination in the construction industry would be undermined if there were, in fact, few minority businesses. This is incorrect. The fact that few minority construction businesses even exist is consistent with, not opposed to, a finding that minorities have suffered past discrimination in the area's construction industry. It suggests, of course, that past discrimination has stymied minority entry into the construction industry in general, as well as participation in government construction contracting in particular.

Second, plaintiffs point out that the City has not determined the extent to which minorities' businesses have been employed in the subcontracting of the City's construction work. Although

plaintiffs again cite no cases on point, they would find constitutional error in the City's relying on its study of prime contracts awarded to minority businesses. The point of this criticism is apparently that, if minority businesses received generous proportions of the City's construction contracts of the subcontract level, then the City's finding of continuing effects of past discrimination would be flawed. If minority businesses did indeed receive generous proportions of the City's construction business at the subcontract level, then plaintiffs might have a point. But they have produced no evidence suggesting that minority businesses fare any better at the subcontract level of the City's construction projects than at the prime contract level. In the absence of such evidence, and given the dismally low level of minority business participation

in the City's prime contracts and the dearth of minority businesses in the Richmond area construction industry, plaintiffs' objection borders on the frivolous.

The Court's conclusion that the City's findings are adequate is supported by the case law. There are, to be sure, cases in which minority set-aside programs in public contracting have been expressly supported with findings of specifically identified incidents of discrimination, rather than the more general evidence that was before the Council concerning present effects of past discrimination. See, e.g., South Florida Chapter v. Metropolitan Dade County, n.12 supra, 723 F.2d at 853 (past discriminatory practices had impeded development of black businesses; identified discrimination against black contractors had occurred prior to

county's affirmative action plan); Schmidt v. Oakland, supra, 662 F.2d at 558-59 (non-minority-owned contracting firms had been unwilling to participate with minority-owned firms; non-white contractors complained that they had been excluded from participation in bids of white general contractors). Such findings may support conclusions of past discrimination more strongly than the evidence here. But findings of past discrimination have also been held sufficient where the evidence was less compelling than it is here. See Southwest Washington Chapter v. Pierce County, n. 12 supra, 667 F.2d at 1100 ("numerous unrecorded meetings and conferences with interested parties"; preamble of ordinance recognizing underrepresentation of women and minorities in the county work force; general national and statewide findings). And in the only

case this Court located in which the governmental findings were held inadequate, those findings consisted solely of a conclusory declaration in the preamble of the ordinance. The declaration stated that the ordinance was a response to the continuing effects of past official discrimination against minorities. See Arrington v. Associated General Contractors, supra, 403 So. 2d at 896, 902. The Alabama Supreme Court noted that there was "no evidence that the ordinance was the considered response to hearings, reports, debates, or empirical studies." Id. at 902. In this case, by contrast, the Council had the benefit of a public hearing, debates, and an empirical study addressing the need for the Plan as a response to negligible participation by minority businesses in City construction projects.

In sum, there was ample evidence before the Richmond City Council to ensure that, in adopting the Plan, the Council was remedying the effects of past discrimination and not advancing one group's interests over another's.

3. Use of Racial Classifications not Extending Further Than Established Need of Remedying the Effects of Past Discrimination.

The third element of the South Florida Chapter test focuses on the means that a minority set-aside program employs. Plaintiffs identify several aspects of the Plan that they believe render it invalid as a means of remedying present effects of past discrimination. Plaintiffs and defendant both have referred to the five categories that Justice Powell has articulated in Fullilove,[13] as well as to other factors,

in evaluating the appropriateness of the means that the Plan employs.

a. Reasonableness of the percentage chosen.

Plaintiffs first complain that a set-aside of 30% is unreasonably high and therefore invalidates the Plan. They argue that, in assessing the reasonableness of a set-aside percentage for MBEs, the Court must compare the set-aside percentage with the actual percentage of MBEs in the area. They contend that it is unreasonable for the City to establish a set-aside percentage based on the proportion of minorities in the general population (about 50%) without considering the actual percentage of MBEs in the area as well. Given that all the parties agree that the actual percentage of MBEs in the area, although undetermined with precision, is well below the 30% set-aside goal mandated by

the Plan, plaintiffs argue that the Plan is unconstitutionally broad. The Court concludes to the contrary, however.

The authority plaintiffs cite is, in the Court's view, not supportive of their contention that the Plan's set-aside goal is excessive. They first focus on Justice Powell's observation in Fullilove that the 10% set-aside established in the Congressional plan at issue in that case "falls roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the nation." Fullilove, supra, 448 U.S. at 513-14. But Justice Powell did not purport thereby to establish some formulaic test of reasonableness of the set-aside percentage based on the relationship between the percentage of minority businesses in the business community and the percentage of minorities in the

general population. Indeed, Justice Powell's remarks in the paragraph following this observation offer better guidance as to his view of how to evaluate the reasonableness of a set-aside percentage. He noted that in certain parts of the country with few minorities, the 10% goal "might be unfair if it were applied rigidly." Id. at 514. Because the congressional plan at issue included a waiver provision, which used as factors governing the issuance of a waiver "the availability of qualified minority contractors in a particular geographic area, the size of the locale's minority population, and the efforts made to find minority contractors," Justice Powell found nothing unreasonable about the prospect that the set-aside percentage might exceed the minorities avaiable. Id.

Similar to the remedial program upheld in Fullilove, the Plan here includes a waiver provision that takes into account the availability of MBEs and the efforts of the non-MBE contractor to find MBEs. Although the 30% MBE set-aside would be unreasonable if it were rigidly applied where no MBEs were available to fulfill the requirement, the Plan's waiver provision allows the Plan to be administered in an appropriately flexible, reasonable manner. Although plaintiffs maintain that the waiver provision has not in fact been administered in such an appropriately flexible way, alluding to Croson's experience with the waiver provision, the Court finds that Croson's experience does not establish that the waiver is inflexibly administered as discussed in more detail supra, the City's denial of

Croson's request for waiver was not unreasonable.

Plaintiffs cite a number of lower court decisions ruling on remedial minority set-aside programs since Fullilove to support their contention that the set-aside percentage is unreasonable because unrelated to the proportion of MBEs in the area. See Ohio Contractors Association v. Keip, supra, 713 F.2d at 169; M.C. West, Inc. v. Lewis, 522 F.Supp. 338, 340 (M.D. Tenn. 1981); Southwest Washington Chapter v. Pierce County, supra, 667 F.2d at 1094; Arrington v. Associated General Contractors, supra, 403 S.2d at 903. In the Arrington case, the Alabama Supreme Court noted that one of the "infirmities" in the set-aside program at issue was that there was no showing in the record of the relationship between the 10% set-aside and "the number of minority

contractors available and equipped to do city construction work." 403 So.2d at 903. The court supplied neither case authority nor reasoning, however, to support its conclusion that this was a constitutional defect. Furthermore, unlike Justice Powell in Fullilove, the Arrington Court did not take into account the effect of the waiver provision on whatever "infirmity" might otherwise exist, even though it recognized that a waiver provision was available. Id. For both of these reasons, this Court declines to follow Arrington. As for the remaining cases, none of them hold or in any way suggest that the reasonableness of a set-aside percentage must be evaluated in terms of the proportion of minority businesses in the area's business community, as opposed to the proportion of minorities in the community's general population.

Indeed, several of the decisions suggest that the percentage of minorities in the community's general population, not the percentage of minority businesses in the area's business community, is the appropriate benchmark for evaluating the reasonableness of a set-aside figure. In Southwest Washington Chapter v. Pierce County, n. 12 supra, 667 F.2d at 1101, the Washington Supreme Court noted that the MBE participation goal was "slightly less than the minority population in Pierce County," and found nothing unreasonable about that relationship. Similarly, in Schmidt v. Oakland Unified School District, n.12 supra, 662 F.2d at 559, the Court of Appeals for the Ninth Circuit found nothing unreasonable about a 25% minority business participation goal, given that "the Oakland population...was more than 34.5% non-white."

Judged by the standard of the percentage of minorities in the general population, the 30% MBE set-aside in the plan is not unreasonable. Richmond's minority population is 50%--well above the participation goal. Reason as well as case authority suggests that the percentage of minorities in the general population, rather than the percentage of minority firms in the business community, is an appropriate basis for evaluating the reasonableness of a minority business set-aside. One of the remedial purposes behind the Plan is to encourage the formation of minority businesses that would have developed, but for race-based discrimination in that industry. The percentage of minorities in the general population is a useful benchmark in determining what that proportion of minority businesses would be. Of course, even without discrimination against

minorities, the participation of ethnic groups in occupational or business fields may vary a great deal, depending on cultural preferences. But given that past discrimination undeniably has limited minority participation in the construction industry, it is fair to assume, for purposes of formulating remedial set-aside programs, that--absent discrimination against minorities--they would participate in a given business field in at least some rough relationship to their presence in the general population. The City's 30% MBE participation goal is hardly unreasonable, in light of these considerations.

b. Adequacy of the Waiver.

Plaintiffs contend that the Plan's waiver procedure does not provide the flexibility and fairness required of a remedial set-aside program under the

equal protection clause. The availability of a meaningful waiver provision undoubtedly has been an important factor in evaluating whether a minority set-aside plan is sufficiently narrow for equal protection purposes. See Fullilove, supra, 448 U.S. at 486-89; Southwest Washington Chapter v. Pierce County, n. 12 supra, 667 F.2d at 1101 (flexible waiver scheme is "key factor."). The Court, for the reasons which follow, rejects plaintiffs' complaints about the waiver.

Under the City's Plan, the relevant regulations provide that in order to justify a waiver, a contractor must show that it made every feasible attempt to comply, and that MBEs able to perform the subcontracts or furnish the supplies specified in the contract were unavailable or unwilling to participate in the contract. See Contract Clauses

¶D. Nevertheless, plaintiffs complain that, although the possibility of a waiver exists on paper, in fact the Plan has been administered inflexibly to require a 30% set-aside. They support this argument with reference to Croson's own experience. But, as the court discusses in more detail, supra, the City's denial of Croson's request for waiver was not unreasonable. Croson's experience does not establish that the 30% set-aside is inflexibly applied.

Plaintiffs next argue that the waiver is inadequate because there is no provision for an automatic waiver where MBEs have submitted so-called "non-competitive bids." They assert that, under Fullilove, an MBE who submits a bid that is not the lowest can only participate so long as the MBE's higher bid only reflects "costs inflated by the present effects of disadvantages or

discrimination." Fullilove, supra, 448 U.S. at 471. Because there is no formal waiver provision to account for such a situation, plaintiffs argue that the Plan is not sufficiently narrowly tailored for its remedial purposes.

This objection to the adequacy of the Plan's waiver is problematic for several reasons, however. First, while it is true that Chief Justice Burger in Fullilove observed that the set-aside plan in that case allowed for waivers where MBEs submitted prices that could not be attributed to present effects of disadvantage or discrimination, neither the Chief Justice nor any other member of the Court indicated that such a waiver is a constitutional requirement. Indeed, such a requirement would be odd. An inquiry into whether relatively high costs reflect present effects of past disadvantage or discrimination would be

difficult to administer, and very likely filled with speculation to the point that whichever party bears the burden of proof would lose the issue. Requiring such a paper inquiry would hardly seem to be an appropriate constitutional requirement.

If Fullilove does require that a minority set-aside program take account of MBE prices in some manner, however, it would be best understood as a requirement that the program provide reasonable assurances that MBEs could not abuse the program by exacting windfall prices for their goods or services. The City's Plan includes such assurances.

As the City points out, market incentives exist under the Plan for an MBE to quote its most competitive price for a project. This is because, in order for an MBE to obtain city business as a subcontractor through set-aside requirements, the prime contractor's

quote must still be the lowest. The MBE must team up with the prime contractor to submit the lowest possible bid as against other teams of MBEs and prime contractors. Further, even if such market incentives do not exist in situations where an MBE has some measure of monopoly power (because there is only one MBE available in the area to provide a certain product or service), the City would be able to exclude that MBE from participation if the MBE were to engage in price gouging, on the grounds that the MBE is not a "responsible" business. These factors provide reasonable assurance that MBEs cannot abuse the Plan to exact unwarranted profits.

Despite Croson's assertions to the contrary, the facts of the Croson case do not establish otherwise. In its letter to the City of November 8, 1983, in support of its request for waiver, Croson

alluded briefly to the fact that the price quoted by an MBE was "substantially higher" than any other quotation. Croson did not suggest in any way that the MBE was taking advantage of a monopoly situation. Before finally denying Croson's request for waiver, the City sought and received from Croson documentation of the extent to which the MBE's quote exceeded Croson's earlier quote. Again Croson did not suggest that the MBE's higher price reflected any attempt by the MBE to charge an improperly high amount. Croson's experience only establishes that the City considers it immaterial that an MBE provides a somewhat higher price than non-MBEs. It does not establish that the City improperly ignores claims that an MBE is taking advantage of the Plan to charge excessive prices.

Plaintiffs' third objection to the Plan's waiver mechanism is that it does not expressly provide for waiver where a minority contractor fails to give notice of his desire to participate. Plaintiffs complain that this can lead to hardship on non-MBEs who are low bidders, because they may be required to rework their bids after the bids have been opened in order to accommodate MBEs who express their desire to participate in an untimely fashion. Plaintiffs contend that Croson's experience demonstrates how this alleged defect may result in undue hardship on non-MBE contractors who submit low bids.

The Court rejects this criticism of the Plan's waiver mechanism. Certainly there is no need for a minority set-aside program to <u>expressly</u> provide for waiver of MBE participation where MBEs do not express their interest in participating

in a contract until after bids are opened. Plaintiffs provide no authority for this proposition.

Further, as the City points out, the Plan places the burden on non-minority contractors to seek out qualified MBEs to participate as subcontractors. There is nothing improper or unfair about such an allocation of the burden. Non-MBEs are required to bear burdens at least as great as these in the minority set-aside program upheld in Fullilove. See Fullilove, 448 U.S. at 492-93 (Appendix to Chief Justice Burger's opinion) (duty to seek out all available bona fide MBEs and make every effort to use as many of them as possible on the project; duty to use MBEs with less experience than available non-minority enterprises; duty to provide technical assistance to MBEs as needed). It would, of course, be somewhat unfair to require the lowest

bidding contractor that had made every feasible effort to solicit MBE participation to re-work its bid after the bids had been opened, on account of an MBE coming forward only then to indicate its interest.[14] However, Croson's bidding experience does not establish that the City has administered the Plan in this manner. As discussed in more detail supra, a local MBE claimed that Croson had not contacted him until the very day that bids were due. At that time the MBE undisputedly indicated his desire to participate, and continued to do so through the time that Croson requested a waiver. The City's denial of Croson's request for waiver in such circumstances does not establish how the City would respond to a request for waiver where a non-MBE contractor is unable to find any MBEs to participate after undisputedly making every feasible

effort to do so, and an MBE comes forward only after the bids have been opened.

Plaintiffs' final objection to the Plan's waiver mechanism is that there is no adequate appeals procedure when a request for waiver had been denied. The court rejects this objection for the following reasons. First, plaintiffs cite no authority for their contention that an appeals procedure is a sine qua non for a valid waiver mechanism in a minority set-aside program. The point of the waiver mechanism for equal protection purposes is to ensure that the minority set-aside program be sufficiently flexible that it is not applied unfairly whose its remedial goals cannot be met. To be sure, an appeals procedure for decisions about waivers may provide some additional assurance that the waiver decision is correctly made. But plaintiffs have not shown, and this Court

is not persuaded, that the availability of an appeals procedure for waiver determinations is essential for equal protection purposes.

But assuming that the availability of an appeal procedure is constitutionally significant, plaintiffs have not shown that the City's procedure is inadequate. The City has a procedure by which a disappointed bidder may protest an award or a decision to award a contract. See Richmond, Va. City Code Ch. 24.1, Art. VII(C). There is no reason why a disappointed low bidder whose request for waiver is denied cannot protest this denial under Article VII(C), once the City decides to award the contract to some other bidder. It may be that such a protest is not available where the City decides to re-bid a contract instead of award it to another bidder.[15] But even if a protest does not

lie where the City decides to re-bid the contract, it should not amount to a constitutional defect--at least where there is no showing that the City is using its authority to re-bid contracts so as to convert the 30% MBE participation goal into an inflexible requirement.[16]

c. Consideration of Alternative Remedies.

Plaintiffs also argue that the Plan is unconstitutional because the Council did not consider the efficacy of alternative remedies. The Court does not find any deficiency in this respect, however. Despite federal, state, and local assistance of various kinds to minority businesses, minority businesses participated in miniscule proportions as prime contractors in the City's construction contracts from 1978 to 1983. Some of those methods of assistance were

explicitly referred to at the hearing. See Transcript of Hearing at 10 (remarks of Mr. Deese). The council members were no doubt also aware of other governmental efforts at various levels to promote minority business development. The plan was both criticized as too drastic, see id. at 48 (remarks of Mr. Kemp), and praised as essential if reasonable levels of minority participation in the City's construction contracts were to be a reality in the near future. See id. at 49 (remarks of Mr. Richardson). All this indicates that the City Council considered the efficacy of alternative responses to promoting greater minority business participation in the City's construction contracting--and rejected them. While plaintiffs assert that the City's consideration of alternatives was inadequate, the only authority they assert for their position is a remark by

Justice Powell in Fullilove that merely identifies the "efficacy of alternative remedies" as a factor to be considered in reviewing race-conscious remedial programs. See Fullilove at 510. As the City notes, no court has yet struck down a minority set-aside program on the ground asserted.

d. Duration of the Remedy.

Justice Powell identified the duration of the minority set-aside program as another factor to be considered in evaluating its validity. Fullilove, supra, 448 U.S. at 510. The City's Plan is scheduled to expire on June 30, 1988--just over five years after its initial adoption. Plaintiffs do not assert that the Plan's duration is unreasonable, and the Court does not find it so.

e. Effects on Innocent Third Parties.

Justice Powell also emphasized in Fullilove that a minority set-aside program should not be approved without considering its effects on innocent third parties. Plaintiffs argue that the effects of the Plan on innocent third parties render it invalid. This factor identified by Justice Powell has not been established as an essential part of the judicial review, for equal protection purposes, of a minority set-aside program. But even if it were, the City's Plan does not appear to be invalid on account of it. The burdens that the Plan may impose on innocent third parties are primarily the following: the burden on non-MBE prime contractors of seeking out MBEs to participate as subcontractors on City construction projects; and the burden on non-MBE subcontractors who would have received some of the City's

construction subcontracting business but for the City's Plan.

Both burdens would seem acceptable, even in Justice Powell's view. The City's construction projects are only some fraction of the overall construction market in the Richmond area, so that non-MBE contractors would hardly be overwhelmed by having to seek out MBE subcontractors in order to compete for City construction contracts. Similarly, non-MBE subcontractors would only be precluded from thirty percent of a fraction of the overall construction market in the area, assuming that the 30% MBE subcontracting goal is met in every contract. Plaintiffs have not shown in any way how the burdens that the Plan may place on innocent third parties would be excessive as a constitutional matter. Indeed, they concede that no court yet has struck down a minority set-aside

program on the ground that it imposes an impermissible burden on innocent third parties.

f. Overinclusiveness.

i. Geographic Limitations.

Plaintiffs' final set of objections to the constitutionality of the Plan focus on three types of overinclusiveness. First, plaintiffs point out that the Plan does not impose any limitation as to where an MBE must be located in order to participate in the Plan. They argue that this renders the Plan impermissibly overinclusive because it allows MBEs outside the Richmond area to become beneficiaries of the Plan. In support of this point, plaintiffs note that several other minority set-aside programs challenged in the courts have included geographic limitations. See, e.g., Arrington v. Associated General Contractors, supra, 403 So. 2d at 897.

But they do not cite, nor has the Court found, any case holding a minority set-aside program to be impermissibly overinclusive because of the lack of any explicit geographic limitations; nor does this Court find the lack of geographical limitations in the instant case permissible.

The Court notes that plaintiffs have not shown that contractors have in fact been required to subcontract to distant MBEs in order to satisfy the requirements of the Plan. Further, as the City points out, if the Plan had limited participants based on explicit geographic boundaries, it may have been subject to challenge under the Privileges and Immunities Clause. See United Building and Construction Trades Council of Camden County & Vicinity v. Mayor and Council of the City of Camden, ____ U.S. ____, 52 U.S.L.W. 4187 (Feb. 21, 1984). Finally,

even assuming that MBEs outside the ordinary Richmond construction contracting area occasionally participate as MBEs under the Plan, no impermissible overinclusiveness would result. A minority set-aside program need not employ means that absolutely guarantee that only those MBEs intended to participate will in fact participate. Rather, there must be a "reasonable assurance" that the application of the MBE program will be limited to accomplishing its remedial objectives. Fullilove, supra, 448 at 489. The Plan does not need an express geographic limitation to provide such reasonable assurance. Indeed, an arbitrary geographic limitation could actually prevent a minority set-aside program from fulfilling its remedial purposes by excluding minority businesses that happen to fall outside the arbitrary geographic

boundaries, but that nevertheless were discriminated against in the contracting out of City construction projects.

ii. MBEs Not Actually Disadvantaged.

Plaintiffs also complain that the Plan is overinclusive because it may allow MBEs that are not economically or socially disadvantaged to participate in its benefits. They argue that the Plan must have a complaint procedure to prevent unjust participation by minority firms whose access to public contracting has not been impaired by illegal discrimination. The City does not deny that the Plan has no procedure for inquiring into the present effects of past discrimination on particular MBEs.

The Court rejects this challenge, however. It is true that the Chief Justice noted in Fullilove that the minority set-aside program upheld in that

case included a "complaint procedure...to prevent unjust participation in the program by those minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination" Fullilove, supra, 448 U.S. at 482.[17] But the Chief Justice did not purport to find that such a complaint procedure is essential in order to avoid impermissible overinclusiveness. Indeed, part of the Chief Justice's opinion expressly addresses the objection of overinclusiveness arising from the possibility that specific MBEs may receive benefits that cannot be justified "as a remedy for the present effects of identified prior discrimination." Id. at 486. In addressing this objection, the Chief Justice did not find it necessary that there be a way to exclude the specific MBEs that are not suffering

present effects of past discrimination. Id. at 486-89. Instead, he noted that "spurious minority-front entities can be exposed." Id. at 488. Thus, preventing participation by sham MBEs, rather than rooting out individual MBEs that do not manifest present effects of past discrimination, appears to be the relevant consideration in the Chief Justice's view.

One of the guiding principles that the Chief Justice sets out in Fullilove is that "a program that employes racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal." Fullilove, supra, 448 U.S. at 480. Plaintiffs in effect argue that equal protection requires any minority set-aside program to provide for individualized inquiry to ensure that

only MBEs actually suffering present effects of past discrimination are benefited through the program. This is more than narrow-tailoring, however; it is a strait-jacket. Plaintiffs have not persuaded the Court that Fullilove and the Equal Protection Clause require a remedial program to meet this standard.

The Court also notes that the Court of Appeals for the Sixth Circuit expressly rejected an identical overinclusiveness challenge to the State of Ohio's minority set-aside program. That court squarely held:

> The fact that individual minority enterprises may not be able to establish that they have suffered economically from past practices of discrimination is of no importance.

Ohio Contractors Ass'n v. Keip, supra, 713 F.2d at 174. Without making reference to Fullilove, the Court of Appeals cited the opinion of Justices Brennan, White, Marshall, and Blackmun in

Bakke for the proposition that "it is enough that each recipient [of preferential treatment] is within a general class of persons likely to have been the victims of discrimination." Bakke, supra, 438 U.S. at 363.

As discussed supra, the Chief Justice does suggest in Fullilove that, in his view, a minority set-aside program must include reasonable assurances that sham MBEs will not participate. Fullilove, supra, 448 U.S. at 488. The Plan provides such assurance. It requires the HRC to verify that any MBE submitted to meet Plan requirements is a "minority-owned and controlled business." Procedure ¶9 (emphasis original). A decision either verifying or disapproving the MBE status of a firm is ultimately subject to further review, once the City awards the contract or announces a decision to award the contract. At that

point, a disappointed bidder can protest the disapproval of its own MBE or the verification of another MBE, through the protest procedures available under the City's general procurement ordinance. See Richmond, Va. Code Ch. 24.1, Art. VII(C). There are, then, ample assurances that sham MBEs will be properly excluded. Thus, the Plan satisfies any valid overinclusiveness concerns about unjust participation by MBEs.

iii. Minority Groups Not Disadvantaged in Richmond.

Finally, plaintiffs complain that the Plan is overinclusive because it may benefit members of minority groups who have not been victims of discrimination in the construction industry in the Richmond area, such as Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.[18] Plaintiffs assert that the only evidence

presented before City Council concerned blacks.

The Court of Appeals for the Sixth Circuit rejected an almost identical challenge in Ohio Contractors, supra, 713 F.2d at 174. This Court likewise rejects plaintiffs' challenge here. First, the Court notes that the evidence before the City Council reflected limited participation (0.67%) by "minority" contractors in City construction contracts, and compared that participation with the City's "minority" population (50%). While the Court takes judicial notice that blacks are by far the largest racial/ethnic minority in the City, and were thus unquestionably severely underrepresented in City contracting, the participation of minorities besides blacks may have been similarly limited in relation to their proportion of the City's population.[19]

Further, when Congress passed the minority set-aside program upheld in Fullilove, it had concluded that participation in the construction industry by members of all these minority groups has remained limited, due to the continuing effects of past discrimination. See Fullilove, supra, 448 U.S. at 487, n. 73.

The Court sees nothing overinclusive, from a remedial standpoint, about allowing members of such groups who may now be in the Richmond area to participate in the Plan, even though the past discrimination limiting their participation in the construction industry may have occurred elsewhere. Indeed, the past discrimination that affected many of the black MBEs in the Richmond area may have occurred in Atlanta or New York rather than in the Richmond area, but plaintiffs

do not suggest that such MBEs should therefore be excluded.

D. Refusal to Grant Croson's Request for Waiver and Request for Appeal.

Croson has alleged that the City's refusal to grant Croson's request for waiver and denial of Croson's request to appeal was arbitrary and capricious, and denied Croson due process of law under both the Fourteenth Amendment of the United States Constitution and Article One, Section Eleven of the Virginia Constitution. Croson has not referred to the state constitutional due process claim in any of its materials filed after the complaint, however; the Court shall treat that basis of the claim as abandoned.

As for the federal procedural due process claim, the requirements of procedural due process apply only to the

deprivation of interest encompassed by the Fourteenth Amendment's protection of liberty and property. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569 (1972). Croson has not even attempted to articulate the nature of any protected property interest it may have. The Court notes, however, that Croson was never awarded the contract at issue, and that the City in its procurement ordinance reserves the right to reject any or all bids or proposals in whole or in part if it is in the City's best interest to do so. See Richmond, Va. Code Ch. 24.1, Art. III (10)(c). Consequently, whatever property interest Croson may have would appear to be quite narrow.

A recent case provides some guidance on the possible property interests arising out of municipal bidding procedures. In Three Rivers Cablevision

v. City of Pittsburgh, 502 F. Supp. 1118 (W.D. Pa. 1980), a bidder on a municipal contract made procedural due process claims. The court noted the City's authority to reject all bids, id. at 1130, but proceeded to find a narrow property interest: the right of the lowest responsible bidder in full compliance with the specifications to be awarded the contract once the City decided to make an award. Id. at 1131. The process due such an interest, that court found, was the nonarbitrary exercise by the city of its discretion to make the award. Id.

As a threshhold matter for such an interest to exist, the party claiming deprivation of due process must be the lowest responsible bidder and in full compliance with the contract specifications. See Three Rivers Cablevision, supra, 502 F. Supp. at 1131.

One of those specifications in the City's Plan is, of course, that a contractor on a city construction project must subcontract 30% of the work to an MBE subcontractor, unless it establishes that MBEs are unwilling or unavailable to perform the work. The city reasonably determined that an MBE was available to fulfill the 30% requirement in the jail plumbing fixtures project on which Croson had bid. Indeed, the City twice determined that this was the case. Before making its first determination, the City had received work from Brown stating that his firm, Continental, was an MBE available to supply plumbing fixtures for the project on which Croson had sought waiver. The City's contract officer verified that Continental was on a state listing of MBEs that perform such work. Croson's request for waiver merely stated that Continental was

"unqualified." There was nothing unreasonable about the City's denying Croson's first request for waiver, on November 2, 1983, under these circumstances. Croson renewed its request for waiver after being informed of the City's denial. In support of its renewed request, Croson argued in a letter that Continental could not in fact supply the necessary materials because it had not established the requisite business relationships with the materials manufacturers; it also claimed that Continental had untimely provided a quote, and that the quote was higher than other quotes Croson had received. Continental represented that it could indeed supply the materials and that it did have the requisite business relationship with the manufacturer to do so. Continental also claimed that Croson had not contacted Continental until the

day the bids were due. At the City's request, Croson later submitted information about the extent to which using Continental on the project would increase the project costs. Faced with this information, the City decided on November 18, 1983 to deny Croson's renewed request for waiver because an MBE was available, and to re-bid the project, inviting Croson to submit a new bid. This decision, like the City's first decision to deny Croson's request for waiver, was not unreasonable.[20]

Almost three weeks later, Croson's counsel by letter sought to exercise Croson's "right of review" of the City's denial of its request for waiver, although it did not specify the legal authority for its right of review. The city refused; it had elected to re-bid the project, and informed Croson that there is no right to an appeal of such

decisions. Plaintiffs have not shown that any appeal of the City's decisions to re-bid projects is available.[21] Thus, the City's refusal to give Croson any further consideration of the issue of waiver, after deciding to re-bid the project, was in accordance with its rules. In sum, there was nothing arbitrary or capricious about the City's repeated denials of Croson's request for waiver or about the City's refusal to hear Croson's appeal of that denial. Further, because Croson has failed to establish that it was in full compliance with all the requirements of the contract, it had no protected property interest entitled to procedural due process.

E. Denial of MBE Status to Mega's Subcontractor Taylan.

Mega complains that the City improperly denied MBE status to Taylan,

one of the MBEs submitted in connection with its bid. Mega contends that the City improperly inquired into whether Taylan, the MBE at issue, was 51% minority controlled. Mega apparently believes that this test is improper because it does not mirror the language of the Plan itself. In order for a stock corporation to qualify as an MBE, the Plan requires that "at least fifty-one percent of the stock" be owned and controlled by minority group members. Richmond, Va. Code Ch. 24.1, Art. I (Part B)(27.10). Mega points out that Taylor, a black man, owned 51% of Taylan's stock. Apparently Mega believes that it is inappropriate for the City to inquire into whether a stock corporation's business is minority controlled; the only relevant inquiry in Mega's view is whether 51% of the corporation's stock is minority controlled.

There is no dispute that the City focused on whether Taylan as a business is "minority owned and controlled," rather than whether Taylan's stock is "owned and controlled" by a minority. Indeed, the DGS regulations implementing the Plan call for this inquiry. See Procedure ¶9. The Plan authorizes the Director of DGS to promulgate rules and regulations to implement DGS regulation requiring an inquiry into the minority control of the business itself, rather than the stock of the business, is not unauthorized by or inconsistent with the Plan. The Plan evinces the City's concern that MBEs participating in the Plan be majority-controlled as well as majority-owned. The City amended the Plan precisely for this purpose several months after enacting it, adding to the Plan's definition of "minority business enterprise" the requirement of minority

control. See Richmond, Va., Ordinance to Modify the Definition of "Minority Business Enterprise, etc., 83-127-116, § 1 at 6 (June 20, 1983). It is true, of course, that the ordinance states that a stock corporation qualifies as an MBE where 51% of the stock is owned and controlled by minority group members. But the City Council's obvious purpose behind adding the "control" requirement was to ensure that any business participating in the Plan as an MBE would not be a sham, nominally owned by minority group members but in fact controlled by non-minorities. The fact that the Plan specifies that stock corporations must have 51% of their stock owned and controlled by minority group members was surely not designed as a way to allow businesses that are not actually controlled by minorities to participate in the Plan. Rather, it reflects the

assumption that if 51% of the stock of a business is owned and controlled by minorities, then a majority of the business itself is controlled by minorities. Thus, it is not inconsistent with the Plan for City authorities, in administering it, to make their determination about a firm's MBE status based on an inquiry into minority control of the business as well as minority control of the business's stock, even where the business is a stock corporation.

The City reasonably concluded that Taylan was not 51% controlled by minority group members. When the City made its decision, it knew that Taylan was a new company. It had reliable evidence that--of all of Taylan's management functions--minority control was only exercised in the areas of personnel selection and job supervision. Taylor

himself had no business experience with respect to purchasing, bid preparation, sales, and all financial matters; he was responsible in name only for these areas. In addition, although Taylor was the majority owner of Taylan, his stock was financed entirely by a loan from Mega--his employer. The City did not err in concluding that Taylan, as a business, was not 51% controlled by minority group members.

Indeed, the evidence is such that the City reasonably could have concluded that 51% of the stock, as well as 51% of the business entity itself, was not controlled by a minority. Although Taylor nominally owned 51% of Taylan's stock, the purchase was totally financed at Mega's suggestion by a loan from Mega. For the loan, Taylor gave to Mega a note that was payable on demand and was secured by the stock certificate. While

the agreement pledging the stock certificate as security did state that Taylor retained all rights of ownership, Mega possessed the power effectively to force Taylor to surrender his ownership if he did not comply with Mega's wishes. Not only was the note payable on demand, but Taylor was an employee of Mega's. Had he sought to pay off the loan in order to exercise independent control of his Taylan stock, Mega had the power to terminate Taylor as a Mega employee.

Finally, the Court notes that whatever "rights of ownership" Taylor retained under the pledge agreement are minimal. Taylor theoretically could have sold his Taylan stock, but there would be little if any market for the stock of a new, close corporation, especially where the stock secured a loan. Taylor also was theoretically entitled to share in Taylan's profits according to his

ownership. But Taylan was not earning any overall profit in which Taylor could be expected to participate. Finally, Taylor theoretically could vote his stock (or wield his voting power) to affect Taylan's management policies. But every indication is that Taylor had no role whatsoever in Taylan's long-term management decisions, and only a minor role in Taylan's day-to-day management.

Thus, the City's decision that Taylan is not an MBE (and, therefore, that Mega had not satisfied the Plan requirements) is reasonable, whether the standard for determining a stock corporation's MBE status is minority ownership and control of 51% of the business, or minority ownership and control of 51% of the stock.

F. Federal Statutory Claims.

All the parties agree that plaintiffs' federal statutory claims--42

U.S.C. §§ 1981, 1983, and Title VI, 42 U.S.C. § 2000d--cannot be the basis of a violation unless plaintiffs also establish a violation of the Equal Protection Clause of the Fourteenth Amendment. This is true with respect to the Title VI claims. See Fullilove, supra, 448 U.S. at 517 n.1 (opinion of Brennan, J.). It is also true of plaintiffs' claims under Sections 1981 and 1983, which are predicated on the assumption that the City has denied to plaintiffs their federal constitutional rights. Because the Court has found no constitutional violations, these claims also are denied.

IV. Conclusion

For the reasons discussed above, the Court concludes that all of plaintiffs' challenges to the Plan must fail. The City has moved for an award of its attorneys' fees in both cases under 42

U.S.C. § 1988. These motions will be denied.

An appropriate order will issue.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date December 3, 1984

FOOTNOTES

[1]The Plan as it now stands was actually passed pursuant to two ordinances. The first ordinance, providing most of the Plan as it now stands, was adopted by the Council on April 11, 1983. See Richmond, Va., Ordinance No. 83-69-59 (April 11, 1983). It was in the nature of an amendment to the City's general procurement procedures for purchasing the City's materials and services, which had been adopted five months earlier. See Richmond, Va., Ordinance No. 82-294-270 (December 20, 1982). The Plan was amended several months after its adoption, changing the definition of minority business enterprise to require control as well as ownership by minority group members. Ordinance No. 83-127-116, § 1 at 6 (June 20, 1983).

[2]This requirement is also satisfied when the contractor itself is an MBE. Richmond, Va. Code Ch. 24.1, Art. VIII-A(A).

[3]The rules promulgated by the Director of DGS governing waivers are embodied in two documents. The first is titled "Purchasing Procedure No. 61" ("Procedure") (attached as Appendix A). The second is titled "Contract Clauses, Minority Business Utilization Plan, Thirty Percent (30%) Award Requirement for Construction") ("Contract Clauses") (attached as Appendix B). As established in these two documents, the waiver process involves DGS and the City's Human Relations Commission (HRC).

Prospective bidders on projects covered by the Plan are notified of the Plan and its waiver provisions at the outset of the bidding on a particular project. They receive in their bid package a copy of Contract Clauses, which informs them that the contract being bid is covered by the Plan, and also explains the Plan and the provisions for waiver. See Procedure ¶2. Prospective bidders also receive in their bid package a "Minority Business Utilization Committment Form" ("Commitment Form"), on which to indicate how they intend to meet their 30% MBE requirement. Contract Clauses list names and telephone numbers of agencies that are available to provide a prospective bidder with assistance in locating an MBE. See Contract Clauses ¶C.

After the close of bidding, DGS opens the bids and determines the apparent low responsive bidder. If that bidder requests a waiver, DGS forwards the request to HRC. Procedure ¶¶5-7. HRC reviews any request for waiver and returns it to DGS with a written explanation for its action. Procedure ¶¶10-12. DGS must then "approve or disapprove waiver, if required." Procedure ¶14.

[4]The protest must be submitted no later than ten days from the date of the award or announcement of the decision to award, whichever comes earlier. Richmond, Va. Code Ch. 24.1, Art. VII(C)(1).

[5]In any case, whatever telephone contacts did occur on September 30 were

brief--from one minute (2 calls) to four minutes (one call), according to telephone billing records. Bonn was not especially helpful to the MBEs he contacted: at least one requested bid specifications, which Bonn declined to provide, although Bonn did inform him about how those specifications could be obtained. Bonn asserts that it is industry custom for the subcontractor to obtain the bid specifications, although the bid clerk of one of the MBEs that Bonn contacted gave contrary testimony in a deposition.

[6] The two provisions are Va. Code § 11-37(5)(Supp. 1984) (requiring public contracts to be awarded to the lowest responsive and responsible bidder), and Va. Code § 11-44 (Supp. 1984) (prohibiting racial discrimination in public contracting).

[7] The exemption reads, in pertinent part:

> ...the provisions of this Act also shall not apply, ... to any county, city, or town whose governing body adopts by ordinance or resolution alternative policies and procedures which are based on competitive principles...

Va. Code § 11.35(D)(Supp. 1984).

The statute also requires that any alternative policies and procedures be "generally applicable to procurement of goods and services by such governing body and the agencies thereof," see id. Further, the statute provides that certain provisions of the Procurement

Act--those specified in Section 11-35(E)--cannot be avoided by a local government through the adoption of an alternative procurement plan. See id. Plaintiffs do not contend that the City's procurement plan is not "generally applicable" or avoids any unavoidable provisions of the Act specified in Va. Code § 11.35(E).

[8] Plaintiffs do not argue that the Plan is forbidden by this section. Although plaintiffs did make such an allegation in their complaints, they have since withdrawn that contention, because they recognize that even if it were construed as they would have it, Section 11-44 is not applicable to local governments that have chosen to adopt their own procurement procedures. See Va. Code § 11.35(D), (E).

[9] As with Section 11-44, Section 11-48 does not apply to a public body that chooses to adopt its own procurement procedures. See Va. Code § 11.35(D), (E).

[10] The United States Supreme Court upheld a federal minority set-aside program in Fullilove v. Klutznick, 448 U.S. 448 (1980). Virginia did not pass the Act until 1982. See 1982 Va. Acts Ch. 647.

[11] Those five factors are: (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the extent of minority business involvement required by the remedial program and the percentage

of minority group members in the relevant population or work force; (iv) the availability of waiver provisions; and (v) the effect of the set-aside upon innocent third parties. Fullilove supra, 448 U.S. at 510-14 (Powell, J., concurring).

[12] See, e.g., South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida, 723 F.2d 846 (11th Cir. 1984), appeal pending; Ohio Contractors Association v. Keip, 713 F.2d 167 (6th Cir. 1983); Schmidt v. Oakland Unified School District, 662 F.2d 550 (9th Cir. 1981, vacated, 457 U.S. 594 (1982) (vacated for failure to reach merits of state statutory issue before deciding federal constitutional claim); Southwest Washington Chapter, Nat'l Electrical Contractors Ass'n. v. Pierce County, 667 P.2d 1092 (Wash. 1983); Arrington v. Associated General Contractors of America, 403 So. 2d 893 (Ala. 1981), cert. denied., 455 U.S. 913 (1982).

[13] See supra note 11.

[14] The court does not hold, however, that such a procedure would render a minority set-aside program unconstitutional. Non-MBEs were required to bear substantial burdens in terms of seeking out and assisting MBEs in the minority set-aside program upheld in Fullilove. See 448 U.S. at 492-93.

[15] When Croson sought to appeal the denial of waiver, the City represented in a

letter that it was a moot issue because the City had decided to re-bid the contract and that the City's decision to re-bid cannot be appealed. In this litigation, however, the City has also represented that Croson's request for appeal the denial of waiver was too late.

[16]The City's decision to re-bid the jailhouse fixtures contract on which Croson had bid does not establish that the City has used its authority to re-bid so as to convert the 30% goal into a rigid requirement. When it decided to re-bid the project, the City had reasonably determined that Croson's request for waiver should be denied, as discussed infra. Given the controversy between the MBE and Croson, the fact that Croson was the only contractor to bid on the contract, and the fact that Croson's request for waiver was reasonably denied, the City's decision to re-bid the contract was a reasonable response to the situation. The City invited Croson to rebid.

[17]It is noteworthy that the administrative guidelines to which Chief Justice Burger referred in this remark, while they do provide a mechanism for complaints about "unjust participation," do not define unjust participation in terms of participation by MBEs whose access to public contracting has not been impaired by the effects of prior discrimination. See id. at 495 (Appendix to Chief Justice Burger's opinion).

[18]There is no evidence that MBEs composed of members of these minority

groups actually have participated in the Plan.

[19] None of the parties has adduced evidence on the proportion of each specific minority group in Richmond's general population or the extent of each group's participation in the City's construction contracts.

[20] Croson has not persuaded the Court with any of the additional evidence it has adduced--after full discovery--that Continental was in fact unavailable, or was taking advantage of the Plan to charge excessive prices. Thus the City's decision was not only reasonable, but appears to have been absolutely correct.

[21] The City has indicated that appeals of denials of requests for waiver are governed by the procedures applicable to a protest of award or decision to award, which must be filed within ten (10) days of the award or the announcement of decision to award. See Richmond, Va. Code Ch. 24.1, Art. VII(C). Assuming this is the appropriate mechanism for appealing a denial of a request for waiver, Croson clearly was untimely.

Article VII(A) of the City Code provides 30 days for appealing where any bidder, offeror, or contractor is "refused permission to, or disqualified from, participating in public contracts." Richmond, Va. Code Ch. 24.1, Art. VII(A). Croson has suggested in its briefs that this is the applicable appeal provision where the City denies a request for

waiver, and that its appeal was therefore not untimely. Even if Croson is correct on this point, the fact remains that the City had elected to rebid the contract, mooting Croson's appeal.

AN ORDINANCE No. 83.69-59

To amend Article I, General Provisions, F. Part B, definitions, of Chapter 24.1, Procurement (Ordinance No. 82-294-270, adopted December 20, 1982) of the Richmond City Code of 1975, as amended; to add definitions of "Minority Business Contractor" and "Minority Group Members", and to add in said chapter a new article numbered Article VIII-A, entitled: "Minority Business Utilization Plan."

Patron - Mr. Richardson and Mr. Marsh

Approved as to form and legality
by City Attorney

THE CITY OF RICHMOND HEREBY ORDAINS:

§ 1. That Article I, General Provisions, F. Part B, definitions, of Chapter 24.1, of the Richmond City Code of 1975, as amended, be and is hereby amended and reordained as follows:

F. Part B -- Definitions

1. Blind trusts. An independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust.

2. Brand name specification. A specification limited to one or more items by manufacturers' names or catalog numbers.

3. Brand name or equal specification. A specification limited to one or more items by manufacturers' names or catalog numbers to describe the standard of quality, performance, and other salient characteristics needed to meet City requirements and which provides for the submission of equivalent products.

4. Business. Any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture or any other private legal entity.

5. Change order (unilateral). A written order signed and unilaterally issued by the Director of General Services directing the contractor to make changes which the "changes" clauses of the contract authorize the Director of General Services to order without the consent of the contractor.

6. City Manager of the City of Richmond, Virginia.

7. City. The City of Richmond, a municipal corporation chartered by the General Assembly, Commonwealth of Virginia.

8. City Council. The City Council of the City of Richmond, Virginia.

9. The Director. The Director of General Services of the City of Richmond.

10. Confidential information. Any information which is available to an employee only because of the employee's status as an employee of this City and is not a matter of public knowledge or available to the public on request.

11. Construction. Building, altering, repairing, improving or demolishing any structure, building or road or street highway, and any draining, dredging, excavation, grading or similar work upon real property.

12. Construction management contract. A contract in which a party is retained by the City to coordinate and administer contracts for construction services for the benefit of the City, and may also include, if provided in the contract, the furnishing of construction services to the City.

13. Contract. All types of City agreements, regardless of what they may be called, for the procurement of goods, services, insurance or construction.

14. Contract modification. Any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provision of any contract accomplished by mutual action of the parties of the contract.

15. Contractor. Any person, company, corporation, or partnership having a contract with the City or a using agency thereof.

16. Cost analysis. The evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.

17. Cost data. Factual information concerning the cost of labor, material,

overhead, and other cost elements, which are expected to be incurred, or which have been actually incurred by the contractor in performing the contract.

18. Cost-reimbursement contract. A contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this ordinance, and a fee or profit, if any.

19. Direct or indirect participation. Involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity.

20. Disadvantaged business. A small business which is owned or controlled by a majority of persons, not

limited to members of minority groups, who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social disadvantages.

21. Emergency Purchases. The director may authorize or order the expenditure of funds for the emergency purchases of supplies, materials, equipment and contractual services for the using agencies without recourse to competitive bidding whenever due to circumstances, accidents or failure of mechanical equipment, the purchase of supplies, materials, equipment, and contractual services are essential to protect and preserve the interests of the city and its inhabitants, the proper functioning of the city government and the efficient rendering of public services.

22. Employee. An individual drawing a salary or wages from the City whether elected or not; any non-compensated individual performing personal services for the City or any department, agency, commission, council, board, or any other entity established by the executive or legislative branch of this City and non-compensated individual serving as an elected official of the City.

23. Goods. All material, equipment, supplies, printing and automated data processing hardware and software.

24. Governing body. The City Council of Richmond, Virginia.

25. Informality. A minor defect or variation of a bid or proposal from the exact requirements of the invitation to bid, or quality, quantity, or delivery

schedule for the goods, services or construction being procured.

26. Insurance. A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils.

27. Invitation for bids. All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids. No confidential or proprietary data shall be solicited in any Invitation for Bids.

27.10. Minority Business Enterprise. A business at least fifty-one per cent of which is owned by minority group members or, in case of a stock corporation, at least fifty-one per cent of the stock which is owned by minority group members.

27.20. Minority Group Members. Citizens of the United States who are

Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.

28. Nominal value. So small, slight, or the like, in comparison to what might properly be expected, as scarcely to be entitled to the same, but in no case to be more than $25.00.

29. Non-professional services. Any services not specifically identified as professional services in the following definition.

30. Professional services. Work performed by an independent contractor within the scope of the practice of accounting, architecture, land surveying, landscape architecture, law, medicine, optometry or professional engineering.

31. Person. Any business, individual, corporation, union, committee, club, other organization, or group of individuals.

32. Price analysis. The evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

33. Pricing data. Factual information concerning prices for items substantially similar to those being procured. Prices in this definition refer to offer or proposed selling prices, historical selling prices and current selling prices. The definition refers to data relevant to both prime and subcontract prices.

34. Public body. Any legislative, executive, or judicial body, agency, office, department, authority, post, commission, committee, institution, board, or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and

empowered by law to undertake the activities described in this ordinance.

35. Qualified products list. An approved list of goods, services, or construction items described by model or catalog number, which prior to competitive solicitation, the City has determined will meet the applicable specification requirements.

36. Request for proposals. (RFP) All documents, whether attached or incorporated by reference, utilized for soliciting proposals.

37. Responsible bidder or offeror. A person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will assure good faith performance, and who has been prequalified, if required.

38. Responsive bidder. A person who has submitted a bid which conforms in

all material respects to the Invitation to Bid.

39. Services. Any work performed by an independent contractor which does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials, and supplies.

40. Sheltered workshop. A work-oriented rehabilitative facility with a controlled working environment and individual goals which utilizes work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status.

41. Small Business. A United States business which is independently owned and which is not dominant in its field of operation or an affilate or subsidiary of a business dominant in its field of operation.

42. Specification. Any written description of the physical or functional characteristics, or of the nature of a good, service or construction item. It may include a description of any requirement for inspecting, testing, or preparing a good, service or construction item for delivery.

43. Using agency. Any department, agency, bureau, board, commission, court, City jail or jail forum or other unit in the City government requiring goods, services, insurance or construction as provided for in this ordinance.

§ 2. That Chapter 24.1 of the Richmond City Code of 1975, as amended, be amended by adding therein a new article numbered Article VIII-A, entitled: "Minority Business Utilization Plan," as follows:

ARTICLE VIII-A

Minority Business Utilization Plan

A. Covered Contracts

All contractors awarded construction contracts by the City shall subcontract at least thirty per cent of the contract to minority business enterprises. Where the general contractor is a minority business enterprise this requirement shall be deemed to be met by the award.

B. Rules and Regulations

The Director of the Department of General Services shall be authorized to promulgate rules and regulations to implement the above requirements, which rules and regulations shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved.

C. Article Remedial; Effective through June 30, 1988

This article is remedial and is enacted for the purpose or promoting wider participation by minority business enterprises in the construction of public projects, either as general contractors or subcontractors.

This article shall be in force and effect thirty days from adoption, but shall expire and terminate as of the last moment of June 30, 1988.

AN ORDINANCE No. 83-127-116

To amend Article I, General Provisions, F. Part B, definitions, of Chapter 24.1, Procurement (Ordinance No. 82-294-270, adopted December 20, 1982), as amended (Ordinance No. 83-69-59, adopted April 11, 1983) of the Richmond City Code of 1975, as amended, to modify the definition of "Minority Business Enterprise" and to amend and reordain Article VIII-A, "Minority Business Utilization Plan", Part A to include within covered contracts the following "purchase of supplies, materials and equipment, contractual services, contracts of insurance and security bonds."

Patron - Mayor West

Approved as to form and legality
by City Attorney

THE CITY OF RICHMOND HEREBY ORDAINS:

§ 1. That Article I, General Provisions, F. Part B, definitions, of Chapter 24.1, of the Richmond City Code of 1975, as amended, be and is hereby amended and reordained as follows:

Article I

F. Part B -- Definitions

1. Blind trusts. An independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust.

24. Governing body. The City Council of Richmond, Virginia.

25. Informality. A minor defect or variation of a bid or proposal from the exact requirements of the invitation to bid, or quality, quantity, or delivery

schedule for the goods, services or construction being procured.

26. Insurance. A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils.

27. Invitation for bids. All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids. No confidential or proprietary data shall be solicited in any Invitation for Bids.

27.10. Minority Business Enterprise. A business at least fifty-one per cent of which is owned and controlled or fifty-one per cent minority-owned and operated by minority group members or, in case of a stock corporation, at least fifty-one per cent of the stock which is owned and controlled by minority group members.

27.20. Minority Group Members. Citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.

28. Nominal value. So small, slight, or the like, in comparison to what might properly be expected, as scarcely to be entitled to the same, but in no case to be more than $25.00.

29. Non-professional services. Any services not specifically identified as professional services in the following definition.

30. Professional services. Work performed by an independent contractor within the scope of the practice of accounting, architecture, land surveying, landscape architecture, law, medicine, optometry or professional engineering.

31. Person. Any business, individual, corporation, union,

committee, club, other organization, or group of individuals.

32. Price analysis. The evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

33. Pricing data. Factual information concerning prices for items substantially similar to those being procured. Prices in this definition refer to offer or proposed selling prices, historical selling prices and current selling prices. The definition refers to data relevant to both prime and subcontract prices.

34. Public body. Any legislative, executive, or judicial body, agency, office, department, authority, post, commission, committee, institution, board, or political subdivision created

by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this ordinance.

35. Qualified products list. An approved list of goods, services, or construction items described by model or catalog number, which prior to competitive solicitation, the City has determined will meet the applicable specification requirements.

36. Request for proposals. (RFP) All documents, whether attached or incorporated by reference, utilized for soliciting proposals.

37. Responsible bidder or offeror. A person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will assure good faith performance, and who has been prequalified, if required.

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39. Services. Any work performed by an independent contractor which does not consist primarily of acquisition of euqipment or materials, or the rental of equipment, materials, and supplies.

40. Sheltered workshop. A work-oriented rehabilitative facility with a controlled working environment and individual goals which utilizes work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status.

41. Small business. A United States business which is independently owned and which is not dominant in its field of operation or an affilate or

subsidiary of a business dominant in its field of operation.

42. Specification. Any written description of the physical or functional characteristics, or of the nature of a good, service or construction item. It may include a description of any requirement for inspecting, testing, or preparing a good, service or construction item for delivery.

43. Using agency. Any department, agency, bureau, board, commission, court, City jail or jail forum or other unit in the City government requiring goods, services, insurance or construction as provided for in this ordinance.

§ 2. That Article VIII-A, Minority Business Utilization Plan, section A, Covered Contracts, of Chapter 24.1, of the Richmond City Code of 1975, as amended, be and is hereby amended and reordained as follows:

ARTICLE VIII-A

A. Covered Contracts

All contractors awarded construction contracts by the City shall subcontract at least thirty per cent of the contract to minority business enterprises. Where the general contractor is a minority business enterprise this requirement shall be deemed to be met by the award.

The City of Richmond in awarding contracts to its contractors, including suppliers, for the sale and furnishing of supplies, materials and equipment, for providing contractual services, and for writing and furnishing policies of insurance and surety bonds in which the City of Richmond is the principal insured or party for whom such bond is written and for which policy of insurance or bond the premium charged is billed to the City of Richmond, shall strive to obtain a

minimum of twenty per cent of same from minority business enterprises in the annual aggregate expenditure for such contracts and services.

Supreme Court, U.S.
FILED
JAN 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-998

IN THE

Supreme Court of the United States

October Term, 1987

CITY OF RICHMOND,

Appellant,

v.

J. A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

---

MOTION TO AFFIRM

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Attorney for Appellee

QUESTIONS PRESENTED

1. Did the record fail to establish that the ordinance remedied past discrimination?

2. Does the Equal Protection Clause of the Fourteenth Amendment preclude a City from adopting a race-conscious legal remedy upon a general recognition of societal discrimination and reliance upon statistics pertaining to minority participation in relation to representation in the general population?

3. Is the ordinance carefully tailored to meet an identified remedial need?

4. Before a governing body may adopt a race-conscious legal remedy for prior discrimination is it necessary that there be a showing of prior discrimination by the governing body?

Note: J. A. Croson Company has no parent company, subsidiary, or affiliate.

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IN THE

Supreme Court of the United States

October Term, 1987

No. 87-998

CITY OF RICHMOND,

Appellant,

v.

J. A. CROSON COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court, moves that the decision of the Court of Appeals, reported in 822 F.2d 1355 (4th Cir. 1987), be affirmed on grounds that the questions are so unsubstantial as not to warrant further argument.

THE QUESTIONS ARE UNSUBSTANTIAL

I.

The Record Fails to Establish That the Ordinance Remedied Past Discrimination.

The questions presented in the Jurisdictional Statement are hypothetical because they are devoid of factual predicate which would enable the Court to answer the questions.

Appellants charge that the ordinance was enacted to remedy what Appellants term "the virtual absence of minority participation in City construction contracts . . . ." To justify this assumption, the City relies on the content of the hearing held prior to the adoption of the ordinance. But the fact is that the transcript of the hearing, which has been lodged with the court, fails to show any discrimination or any underutilization of minorities. The only reference to discrimination at the hearing was a reference to discrimination "in the construction industry in this area" by one of the patrons of the ordinance. The remark came as he introduced statistics on the participation of minority prime contractors, all produced after the close of testimony, and after the Clerk had called the question.[1]

Appellant further invites this Court to grant plenary review to consider such issues as whether the ruling of the Fourth Circuit "endangers" the programs of other cities (Brief of Appellant at 9, 10 n.25.) Decisions of three Courts of Appeals striking down racially discriminatory laws adopted upon improper use of general population statistics are cited as indications that the Circuits are "unguided." (Id. at 10.) The common thread of all of the decisions is that general population statistics are incompetent to establish the basis for a race-conscious legal remedy.[2] However, there is no evidence in this case

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[1] Transcript of Hearing, Richmond City Council, April 11, 1983, at 46. In *Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922, 932-33 (9th Cir. 1987), the Court rejected the validity of a statistic offered to show "virtual exclusion of minority-owned and women-owned businesses from city contracts" where the statistics considered only the level of minority prime contractors rather than subcontractors.

[2] See *Michigan Road Builders Association v. Milliken*, No. 86-1239 (6th Cir. November 25, 1987); *J. Edinger & Son v. City of Louisville*, 802 F.2d 213 (6th Cir. 1986). *Associated General Con-*

which would enable this Court to evaluate the efforts of local governments to encourage minority participation in public contracting.

Appellant merely invites this Court to provide a *post hoc* rationale for the City's action. The Court of Appeals declined that invitation.

> The able trial judge could not point to any evidence beyond that relied upon by the City Council—namely the spurious statistical comparison and the nearly weightless testimony. We cannot uphold the plan based on this evidence, nor would it be proper for us to develop a *post hoc* rationale for the City's racial preference. App. A at 8a.

It has been recognized that some race-conscious affirmative action plans have been adopted for benign purposes without sufficient justification. Days, *Fullilove*, 96 Yale L. J. 453, 458 (January, 1987).[3] Days deplores the tendency to defend such programs "in unqualified terms instead of helping the courts to develop criteria that separate permissible from impermissible programs . . . . " Id. at 459.

> "Although this attitude can be explained, it should not be condoned. Such an approach weakens, not strengthens, the general principle of affirmative action." Id. at 459.

Under the guise of defending affirmative action, Appellant invites this Court to adopt a test which would

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tractors v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987). On remand from this Court, *Janiowiak v. City of South Bend*, Slp. op. n.9, No. 84-1321, (7th Cir., December 16, 1987), cited with approval the Fourth Circuit's decision in this case.

[3] See also Neuborne, *Observations on Weber*, 54 N.Y.U.L. Rev. 546 (1979).

permit governing bodies to adopt race-conscious legal remedies without an adequate showing of a compelling interest or without ascertaining that a particular plan is narrowly tailored to the achievement of that goal.

If all that a City needs to do to adopt racial preferences in public construction is to rely on broad brush assumptions of historical discrimination and an assumed disparity between white and minority participation in the market, there is no way to avoid the danger foreseen by the Fourth Circuit—that the difference between legitimate remedial measures and patronage based on race becomes indistinguishable. See App. A at 4a.

II.

The Equal Protection Clause of The Fourteenth Amendment Precludes A City from Adopting a Race Conscious Legal Remedy Upon a General Recognition of Societal Discrimination and Reliance Upon Statistics Pertaining to Minority Participation in Relation to Representation in the General Population.

The Fourth Circuit has interpreted this Court's decision in *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842 (1986), to preclude a city from adopting an ordinance requiring white prime construction contractors to subcontract 30% of the value of construction contracts to minority businesses where the basis for adopting the ordinance is a recognition of societal discrimination plus reliance on non-probative statistics. App. A at 8a.

The statistics in question involved the number of minority firms that had been awarded construction contracts as prime contractors with the city. City Council had before it no evidence of discrimination other than the statistic. As the City Attorney advised,

> "In the term remedial, we're not just implying that the City was intentionally discriminatory in the past. What we're saying is that there are

> statistics about the number of minorities that were awarded contracts in the past which would justify the remedial aspects of the legislation . . . ." (Id. at 8)

Similarly in *Michigan Road Builders Association, Inc. v. Milliken* the Court of Appeals rejected the significance of statistics that only four of Michigan's 8,112 minority businesses did business with the State. Slp. op. at 22, No. 86-1239 (6th Cir., November 25, 1987.)

The City's minority utilization plan violates the Equal Protection Clause because it is more than "taking race into account." In insisting on the award of public contracts on the basis of race, the ordinance has the same effect as denying a contract to a black because of his race, which is equally violative of the constitution. See, *Wygant*, 106 S. Ct. at 1858 (White, J., concurring.)

This is in contrast to the flexible, case by case, approach of taking race into account in *Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442 (1987) which rejected the "combination of an inadequate foundation for remedial action plus a reflexive adherence to a numerical standard" found in the Richmond plan. App. A at 13a, Citing 107 S. Ct. at 1455.

III.

The Ordinance is not Carefully Tailored to Meet an Identified Remedial Need.

The Court of Appeals has identified a number of factors in its conclusion that the ordinance is not narrowly tailored to remedy past discrimination: the 30% quota was chosen arbitrarily; minority prime contractors are exempt from the minority utilization requirement, and the definition of minorities is overinclusive. App. 11a–12a.

The City made no effort to narrowly tailor the provision of the ordinance. The City merely adopted as

boiler plate the statute which had passed muster in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The City made no effort to tailor the statute to any identified local need, despite Justice Powell's admonition in *Fullilove* that the decision was not an authorization to localities to adopt similar remedies. See 448 U.S. at 515–16, n.14. (Powell, J., concurring.)

The 30% set-aside was derived by arbitrarily reducing the percentage of blacks in the general population by forty percent. All of the cases discussed herein condemn the use of general population statistics in fashioning race-conscious remedies.

The City also failed to consider the lack of administrative mechanisms to prevent or ameliorate undue adverse impact on contractors in industries heavily dependent on public contracts. The Ninth Circuit held such mechanisms to be required. See *Associated General Contractors*, 813 F. 2d at 936.

In *United States v. Paradise*, 107 S.Ct. 1053, 1064 (1987) the Court noted that there are several factors, none of which were considered in this case, involved in determining whether race-conscious remedies are appropriate, including:

> "the necessity for relief and the efficacy of alternative remedies, the flexibility and duration of the relief, including the availability of waiver provisions, the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties."

The instant case offers no attention to any of these matters.

IV.

Before a Governing Body May Adopt A Race-Conscious Legal Remedy For Prior Discrimination It Is Necessary That There Be A Showing Of Prior Discrimination By The Governing Body.

The interest asserted by the City for the adoption of its minority utilization plan is that it is to remedy prior discrimination against black contractors.

Accordingly, this Court should decline the Appellant's invitation to inquire whether there are other interests, which do not require a showing of prior discrimination, which the City might have asserted as a basis for taking race-conscious actions which merely take race into consideration.

Where the asserted interest in adopting a race-conscious legal remedy is to remedy past discrimination there must be a showing that prior discrimination is being remedied. *Johnson, supra*, 107 S.Ct. 1453, 107 S.Ct. at 1461 (O'Connor, J., concurring). Prior decisions of this Court have all turned on whether there was discrimination by the entity which sought to take remedial action. See, e.g., *Sheet Metal Workers v. EEOC*, 478 U.S. ___ , 106 S.Ct. 3019, (1986); *Firefighters v. Cleveland*, 478 U.S. 106 S.Ct. 3063 (1986); *United States* v. *Paradise*, 107 S.Ct. 1053, 1064-66 (plurality opinion), 107 S.Ct. at 1076 (Powell, J., concurring), 107 S.Ct. at 1076 (Stevens, J., concurring), 107 S.Ct. at 1080 (O'Connor, J., dissenting.)

As was noted in *Paradise* government bodies may employ racial classifications "to remedy unlawful treatment of racial or ethnic groups subject to discrimination. 107 S.Ct. at 1064.

In *General Building Contractors Association, Inc.* v. *Pennsylvania*, 458 U.S. 375 (1982), the Court held that minority hiring quotas could not be imposed upon a party who has not been guilty of discrimination.

No prior decision of this Court has held that racial balance for its own sake constitutes a compelling governmental interest. *Wygant*, 106 S.Ct. 1847 (plurality opinion), 106 S.Ct. at 1854 (O'Connor, J., concurring.) In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Justice Powell found the interest of a University under the First Amendment in promoting "the robust exchange of ideas by encouraging racial diversity to justify consideration of race as a factor in the admission process, but not as a legal remedy for prior discrimination. In *Johnson*,[4] an affirmative action plan was allowed to consider race as a factor in promotion decisions, but even then a manifest imbalance was established by competent evidence.

Wygant and *Paradise*, both being cases which involve race-conscious legal remedies, do hold that the discrimination being remedied must be committed by the governing body itself. In this case, there was no particularized finding of discrimination of any kind. So this appeal presents no issue regarding the nature of any finding of discrimination by a local governing body which proposes to enact a race-conscious program.

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[4]*Johnson* was a Title VII case and lends itself to a further distinction based on the assumption that the standard of review is different than in a case in which race-conscious action is reviewed under standards mandated by the Equal Protection clause. See 107 S.Ct. at 1442.

CONCLUSION

Appellant presents no substantial question for the decision of this Court. The decision of the Court of Appeals should be affirmed.

J. A. CROSON COMPANY,
Appellee

By /s/ WALTER H. RYLAND

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January 19, 1988

MOTION FILED
JAN 15 1988

No. 87-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,
Appellant,

v.

J.A. CROSON COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-998

CITY OF RICHMOND,

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J.A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

Pursuant to Rule 36.1 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of appellant. Appellant has consented to the filing of the brief. The motion is necessary because appellee has denied consent.

The *amici*, organizations whose members include municipal and county governments and officials through-

out the United States, have a strong interest in legal issues that affect state and local governments. This case concerns the validity of a temporary minority set-aside program adopted by the City of Richmond, Virginia. The program provides that any firm awarded a construction contract by the City shall, unless it receives a waiver, subcontract 30% of the value of the contract to minority business enterprises (MBEs). A narrowly divided court of appeals held that the Plan violates the Equal Protection Clause.

This case is of exceptional importance to *amici* because minority set-aside programs like Richmond's are very common among state and local governments. At least thirty-two States and 160 local governments currently have such programs.[1] As we explain below, the court of appeals' decision jeopardizes many of these programs. Moreover, the decision has significant adverse implications for the values of federalism in this sensitive and important area. For these reasons, we believe that our perspective can assist the Court in its determination whether to grant plenary review in this case. We accordingly move for leave to file the attached brief *amicus curiae*.

1. The minority set-aside programs enacted by state and local governments were generally adopted after this Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which upheld a set-aside program enacted by Congress. Many of these state and local programs, including Richmond's, were modeled on the federal program upheld in *Fullilove*.

As we explain in the attached brief (pages 5-7, 12) the effect of the court of appeals' decision is to subject state and local set-aside programs to significantly more

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[1] Report of the Minority Business Enterprise Legal Defense and Education Fund (Jan. 1988). A copy of the report has been lodged with the Clerk and sent to the parties.

stringent constitutional requirements than *Fullilove* imposes on the federal government. Because so many state and local programs were adopted in reliance on *Fullilove*, the court of appeals' decision, if it prevails, will jeopardize set-aside programs throughout the Nation.[2] Indeed, the courts of appeals are currently sharply divided on issues raised by minority business set-aside programs.[3] State and local governments are therefore unsure how to proceed in this important area.

2. In addition to imperiling literally hundreds of important state and local programs, the court of appeals' approach threatens important values of federalism. Because the court of appeals in this case has imposed on state and local governments more exacting requirements than *Fullilove* applied to the federal government, state and local governments face an unjustified double standard. The federal government, in the exercise of its spending power, is permitted to prescribe remedies for past discrimination that apply in every state and every municipality. But in identical circumstances, state and local governments—with their vastly greater familiarity with

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[2] We note in this connection that a trade association of contractors that opposes minority set-aside programs has announced an intention to use the court of appeals' decision in this case as a weapon in its legal and political efforts to eliminate existing programs and to prevent the enactment of others. "President's Page," *Constructor* at 5 (Oct. 1987).

[3] See *Michigan Road Builders Ass'n v. Milliken*, 834 F.2d 583 (6th Cir. 1987); *H.K. Porter Co. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987); *Associated General Contractors v. City & County of San Francisco*, 813 F.2d 922 (9th Cir. 1987) (petition for rehearing pending); *J. Edinger & Son v. City of Louisville*, 802 F.2d 213 (6th Cir. 1986); *South Fla. Chapter of Assoc. Gen. Contractors v. Metropolitan Dade County*, 723 F.2d 846 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984); *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167 (6th Cir. 1983); *Schmidt v. Oakland Unified School Dist.*, 662 F.2d 550 (9th Cir. 1981), *vacated on other grounds*, 457 U.S. 594 (1982).

local history and conditions—are disabled from acting similarly to remedy discrimination.

For example, the federal Small Business Act requires certain contractors with the federal government to have a subcontracting plan that includes percentage goals for the utilization of small business concerns owned and controlled by socially and economically disadvantaged individuals (defined to include racial minorities). 15 U.S.C. § 637(d)(6)(A).[4] This requirement is not even explicitly remedial; it is designed to implement "the policy of the United States" that such businesses "have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." 15 U.S.C. § 637(d)(1). Within the City of Richmond, and within hundreds of other cities and counties in the Nation, private contractors are subject to this federal requirement. But under the court of appeals' decision, Richmond and other state and local governments are sharply limited in their ability to impose such requirements on private contractors, even to remedy the effects of prior discrimination. This result inverts important principles of federalism.

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[4] Other federal programs provide for similar racial preferences or set-asides. For example, absent a waiver, 10% of the funds appropriated under the Foreign Assistance Act of 1961, 22 U.S.C. § 2151, must be set aside for the activities of economically and socially disadvantaged enterprises, among others. Omnibus Budget Reconciliation Act of 1987, 133 Cong. Rec. H12434 (daily ed. Dec. 21, 1987). Regulations under the Pennsylvania Avenue Development Corporation Act of 1972 require developers to submit affirmative action plans, and suggest, as minimum affirmative action goals, that 15% of the total dollar value of construction contracts, and 20% of the contracts for professional and technical services and materials and supplies, be awarded to minority-owned businesses. 36 C.F.R. § 906.1(a), (c); 906.3(a); and Exhibit A (1987). The Indian Self-Determination and Education Assistance Act of 1974 authorizes preferences to Indians in certain construction contracts and in the award of subcontracts and subgrants. 28 U.S.C. § 450e(b).

The double standard is especially troublesome because many federal grant programs require state and local governments to have set-asides as a condition of receipt of federal funds. For example, the Public Works Employment Act of 1976, which was upheld in *Fullilove*, requires state and local government grantees to spend at least 10% of the grant for minority business enterprises. 42 U.S.C. § 6705(f)(2).[5] But at the same time, under the court of appeals' decision, Richmond and other state and local governments are prohibited from deciding for themselves that the remedy that will best address the effects of discrimination in their own locality is a similar set-aside of state and local government contracting dollars. As a result, state and local governments find themselves in the position of carrying out federal remedial mandates while they are precluded from enacting their own remedial programs tailored to local conditions.

Because the issues presented by this case are of exceptional importance to *amici* and their members, and be-

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[5] Numerous other federal programs contain similar set-aside requirements. In the absence of a waiver, not less than 10% of the funds appropriated under the Surface Transportation and Uniform Relocation Assistance Act of 1987 are set aside for small business concerns owned and controlled by socially and economically disadvantaged individuals (Pub. L. No. 100-17, § 106(c), 101 Stat. 145-46); the Department of Transportation's implementing regulations under the prior version (Pub. L. No. 97-424, § 105(f), 96 Stat. 2100) require recipients of federal-aid highway funds and urban mass transportation funds to "set and meet overall disadvantaged business goals of at least ten percent." 49 C.F.R. § 23.61(b) (1986). Regulations governing the award of Community Development Block Grants establish a selection system that provides points to applicants that have, for the last two years, awarded 5% to 20% (depending on the percentage of minority population) of the dollar value of their contracts to minority owned and controlled businesses. 24 C.F.R. § 570.424(d)(2); 570.428(d)(2) (1987). See also *id.* § 570.459(m) ("HUD will more favorably consider" Urban Development Action grant proposals for projects in which minorities are participants).

cause *amici*'s perspective may help illuminate the significant and troubling federalism implications of the court of appeals' decision, *amici* respectfully move for leave to file the attached brief in support of appellant.

Respectfully submitted,

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January 16, 1988

QUESTION PRESENTED

Whether the Equal Protection Clause prohibits the City of Richmond from remedying the effects of racial discrimination on minority participation in city construction contracts by enacting a temporary program that, subject to a waiver provision, requires contractors to subcontract a portion of their contracts to minority business enterprises.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-998

CITY OF RICHMOND,

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

STATEMENT

1. In July 1983, the Richmond City Council adopted a Minority Business Utilization Plan. The Plan provides that a contractor who is awarded a construction contract

by the City shall, unless granted a waiver, subcontract at least 30% of the value of the contract to minority business enterprises (MBEs).[1] J.S. App. 2a. The Plan is explicitly "remedial" (J.S. Supp. App. 248) and temporary: it expires at the end of June 1988 (*ibid.*).[2]

The City Council adopted the Plan after holding a hearing during which it received testimony and information about the history of public construction contracting in Richmond. The Council learned that during the preceding five years, only two-thirds of 1% of the dollar value of construction contracts awarded by Richmond was awarded to MBEs. J.S. Supp. App. 38, 115. The population of Richmond is approximately 50% minority. *Ibid.* The City Manager and a member of the City Council stated, on the basis of their experience, that there was widespread discrimination in the construction industry in general and in Richmond in particular; opponents of the Plan within the Council, and representatives of contracting associations who spoke at the hearing, did not dispute these statements. *Id.* at 38, 164-165. The City also relied on findings made by Congress, when it enacted a comparable program for federal construction funds—the program upheld in *Fullilove v. Klutznick*, 448 U.S. 448 (1980)—that "low levels of minority business participation in the construction industry in general and government contracting in particular reflect continuing effects

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[1] The Plan contains a detailed definition of which businesses qualify as minority business enterprises; essentially it requires minority ownership and either minority control or minority operation. See J.S. Supp. App. 115-116, 251-252. A general contractor that is itself a minority business enterprise need not subcontract 30% of its contract to other MBEs. *Id.* at 247. The Plan also provides that the City must verify that an enterprise claiming to be an MBE is not a sham. See *id.* at 62.

[2] Appellee seeks damages in addition to declaratory and injunctive relief. Thus, the case will not become moot when the Plan expires. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8-9 (1978).

of past discrimination." J.S. Supp. App. 165; see *Fullilove*, 448 U.S. at 465-467.

2. In September 1983, the City invited bids on a project that involved the installation of certain plumbing fixtures in the City Jail. Appellee was the only bidder. After the bidding was closed, appellee sought a waiver of the requirement that it subcontract with an MBE. J.S. App. 2a-3a; J.S. Supp. App. 120-124. The City declined to grant the waiver and, when appellee sought to increase the price of its contract with the City, the City reopened the bidding on the contract. The City invited appellee to submit a new bid. J.S. App. 3a.

Instead, appellee brought this action, which was removed to the United States District Court for the Eastern District of Virginia. Appellee sought injunctive and declaratory relief and damages, claiming, among other things, that the Plan violated its rights under the Equal Protection Clause of the Fourteenth Amendment. The district court rejected appellee's claims (J.S. Supp. App. 110-232), and the court of appeals affirmed (*id.* at 1-109). This Court granted appellee's petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded the case for reconsideration in light of *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842 (1986). See 106 S. Ct. 3327 (1986).

3. On remand, a divided court of appeals reversed the judgment of the district court and held the Plan unconstitutional. J.S. App. 1a-26a. The majority acknowledged that, under *Wygant* and *Fullilove*, a City may use a racial preference in order to "redress a practice of past wrongdoing" (J.S. App. 14a). But the majority ruled that the Richmond Plan was invalid because there was "no record of prior discrimination by the city" in this case. *Id.* at 6a.

Specifically, the majority asserted that the statements made during the City Council hearing were not sufficient

to support the Plan because they were "conclusory" and "highly general," and some were made by supporters of the Plan. J.S. App. 6a. The majority also rejected as "spurious" (*id.* at 8a) the City's argument that an inference of discrimination was raised by the virtual absence of city contracts awarded to minorities, even though minorities constituted half the City's population. The majority stated that this disparity did not "demonstrate discrimination" because "[t]he appropriate comparison is between the number of minority contracts and the number of minority *contractors*" (*id.* at 7a; emphasis in original).

The majority also concluded that even if the Plan were supported by the need to remedy past discrimination, it would be unconstitutional because "it is not narrowly tailored to that remedial goal." J.S. App. 11a. The majority asserted that the 30% figure was chosen "arbitrarily"; that the definition of an MBE was not narrowly tailored; that the provision for a waiver was too "restrictive"; and that the temporary nature of the plan was immaterial because "[w]hether the . . . [P]lan will be retired or renewed in 1988 is, at this point, nothing more than speculation." *Id.* at 11a-13a.

Judge Sprouse dissented. J.S. App. 14a-26a. The court of appeals denied rehearing en banc by a vote of 6-5. *Id.* at 27a-28a.

ARGUMENT

The court of appeals' decision is inconsistent with decisions of this Court and imposes unreasonable and impractical requirements on state and local governments that seek to remedy past discrimination. Moreover, the approach of the court of appeals, if it were to prevail, would potentially affect nearly two-thirds of the States and literally hundreds of local governments, all of which have adopted programs, similar to Richmond's, that are designed to overcome the effects of past discrimination

against minority business contractors. Plenary review is therefore warranted.

1. Richmond's Minority Business Utilization Plan—like the similar programs of many other state and local governments [3]—was modeled on the federal program that this Court upheld in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The *Fullilove* program required that 10% of the federal funds awarded for local public works programs be used to procure services and supplies from MBEs. See 448 U.S. at 453-454 (opinion of Burger, C.J.). The various opinions in *Fullilove* explained that this program was constitutional because it was a legitimate effort to remove "barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct." *Id.* at 478; see *id.* at 499-506 (Powell, J., concurring); *id.* at 520 (Marshall, J., concurring in the judgment).

The court of appeals' approach in this case is utterly inconsistent with *Fullilove*. For example, the court of appeals condemned as "spurious" and "not . . . meaningful" the overwhelming disparity between the percentage of minorities in Richmond's population and the percentage of public contract funds that had been awarded to minorities. J.S. App. 8a, 10a. But in *Fullilove*, a majority of the Members of this Court relied on precisely the same statistical comparison to support their conclusion that Congress was acting to remedy past discrimination. See 448 U.S. at 459 (opinion of Burger, C.J.) ("[I]n fiscal year 1976 less than 1% of all federal government procurement was concluded with minority business enterprises, although minorities comprised 15-18% of the population"); *id.* at 511, 513 (Powell, J., concurring); *id.* at 520 (Marshall, J., concurring in the judgment). Indeed, in *Fullilove* the statistical disparity was

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[3] See Motion for Leave to File Brief of the National League of Cities, *et al.*, *supra* [hereinafter "Motion"].

far less dramatic than the 0.67% to 50% disparity that Richmond faced.

Similarly, the court of appeals disparaged the City's waivable 30% goal as an "arbitrar[y] . . . figure [that] simply emerged from the mists." J.S. App. 11a. *Fullilove* rejected a similar attack on the 10% figure used by Congress. Justice Powell explained that the use of a 10% set-aside was warranted because that figure fell approximately "halfway between the present percentage of minority contractors and the percentage of minority groups in the Nation." 448 U.S. at 513-514 (Powell, J., concurring). See also *id.* at 488-489 (opinion of Burger, C.J.). There were almost no minority contractors in Richmond (see J.S. Supp. App. 164), which has a minority population of 50%. The City's choice of a waivable 30% goal is therefore firmly supported by Justice Powell's logic.

The court of appeals' approach to the non-statistical bases of the Richmond Plan is similarly irreconcilable with *Fullilove*. The court of appeals discounted the statements, made during the Richmond City Council's hearing, that contracting practices and the construction industry in Richmond had been marked by discrimination, on the ground that these statements were "conclusory," "general," and often made by supporters of the Plan. J.S. App. 6a. But in *Fullilove*, a majority of the Members of this Court relied on statements of comparable generality made either by supporters of the federal plan or by members of a congressional subcommittee who supported a similar federal program to aid minority enterprises. See 448 U.S. at 458-463 (opinion of Burger, C.J.); *id.* at 504 (Powell, J., concurring); *id.* at 520 (Marshall, J., concurring in the judgment). The court of appeals suggested that the City's plan was invalid because "[t]here has been no showing that qualified minority contractors who submitted low bids were passed over [or] . . . that minority firms were excluded from the

bidding pool." J.S. App. 8a. But this Court cited no such evidence in *Fullilove*.[4]

2. Not only is the court of appeals' approach inconsistent with *Fullilove*, but it wholly disregards the practical difficulties faced by state and local governments when they attempt to remedy the effects of discrimination. For example, in rejecting the statistical disparity on which the City relied—the disparity between the number of contracts awarded to minorities and the minority population of the City—the court of appeals asserted that "[t]he appropriate comparison is between the number of minority contracts and the number of minority *contractors*" (*id.* at 7a; emphasis in original).

Justice O'Connor has recently explained why this reasoning is wrong: when discrimination prevents minorities from "obtaining th[e] experience" that they need to qualify for a position, the "relevant comparison" is not

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[4] In addition, of course, the City had before it the same evidence that Congress had when it enacted the *Fullilove* program—"direct evidence . . . that [a] pattern of disadvantage and discrimination existed with respect to state and local construction contracting" (*Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.)). This Court has ruled that in regulating in an area involving First Amendment rights, a City is "entitled to rely on the experiences of . . . other cities, and in particular on [other] 'detailed findings' . . . . The First Amendment does not require a city, before enacting . . . an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). It follows *a fortiori* that specific congressional findings about discrimination in state and local contracting practices, found by this Court to be supported by "abundant evidence" (*Fullilove*, 448 U.S. at 477 (opinion of Burger, C.J.)), can form a basis for the City's actions.

The City Council also had available to it evidence pertaining to Richmond's own history. See, *e.g.*, *Bradley v. School Board*, 462 F.2d 1058, 1061, 1065 (4th Cir. 1972) (en banc), aff'd by an equally divided Court, 412 U.S. 92 (1973).

with the percentage of minorities who have experience but with "the total percentage of [minorities] in the labor force." *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1462 (1987) (O'Connor, J., concurring in the judgment). Discrimination discourages and prevents minorities from entering the pool of contractors. See J.S. App. 20a & n.11; J.S. Supp. App. 167, 180. The Court has recognized that entrenched hiring discrimination will deter minorities from applying for jobs;[5] *a fortiori*, discrimination will discourage minorities from forming contracting firms, a much more expensive and difficult task than simply applying for a job. The absence of a significant disparity between the number of minority contracts and the number of minority contractors may simply be evidence that minorities, faced with impenetrable discrimination, did not quixotically enter a business in which they knew they would not be allowed to succeed.

Faced with the undisputed fact that there were essentially no minority contractors in a City that was half minority, the Richmond City Council could have concluded either that virtually no minorities were willing and able to become contractors, or that some appreciable percentage had been excluded by discrimination. The Council, with its intimate knowledge of the City's history, thought the latter hypothesis was more plausible. The court of appeals suggested no adequate reason for denying the City the right to reach this conclusion. See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977); *Johnson*, 107 S. Ct. at 1465 (O'Connor, J., concurring in the judgment).

Similarly, the court of appeals dismissed the nonstatistical evidence advanced by the City because it was general in nature and did not specify discriminatory

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[5] See, *e.g.*, *Sheet Metal Workers v. EEOC*, 106 S.Ct. 3019, 3036-3037 (1986); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-367 (1977).

acts. See J.S. App. 8a, 10a. But as Members of this Court have admonished, a legislative body, such as a City Council, does not function by making "specific factual findings with respect to each legislative action." *Fullilove*, 448 U.S. at 503 (Powell, J., concurring); see *id.* at 478 (opinion of Burger, C.J.). Elected state and local representatives bring to bear knowledge that they have gathered over their entire tenure in office from a wide range of sources, including their general experience in public life and their contacts with constituents. This collective knowledge cannot be cabined in "findings" (J.S. App. 5a) or "showing[s]" (*id.* at 8a) about specific acts of discrimination.

In addition, as the Court has often pointed out, a specific admission of past discrimination could expose a state or local government to liability in damages; requiring such an admission would, therefore, deter voluntary efforts to eradicate the effects of past discrimination. See, *e.g.*, *Johnson*, 107 S.Ct. at 1451 & n.8, 1457; *Firefighters v. Cleveland*, 106 S.Ct. 3063, 3072 (1986); see also *Steelworkers v. Weber*, 443 U.S. 193, 204 (1979); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

But perhaps most important, state and local governments that address the problem of past discrimination seek to remedy it and to move on to new issues without reopening old wounds. The court of appeals' approach would force state and local governments that wish to remedy past discrimination to engage in accusations and recriminations directed at specific actors. Such a divisive process would benefit no one.

3. The court of appeals relied entirely on *Wygant* to justify its ruling. The court of appeals interpreted *Wygant* to require "findings" of prior discrimination and, in this case, a showing of a statistical disparity between the percentage of minority contractors and the

percentage of contracts awarded to minorities. J.S. App. 5a.

Wygant imposed no such requirements. See *Johnson*, 107 S. Ct. at 1462 (O'Connor, J., concurring in the judgment) (when past discrimination has prevented entry into a specialized labor market, *Wygant* requires only a comparison "to the total percentage of [minorities] in the labor force."). At most, *Wygant* required that governments have "a strong basis in evidence" or "a firm basis for believing that remedial action is required." *Wygant*, 106 S. Ct. at 1848 (plurality opinion); *id.* at 1853 (O'Connor, J., concurring). Indeed, one Member of the five-Justice *Wygant* majority carefully explained why—contrary to the majority below—specific, contemporaneous "findings" of discrimination should *not* be required. *Id.* at 1854-1856 (O'Connor, J., concurring).[6]

The Court invalidated the affirmative action plan at issue in *Wygant*—a plan that afforded minority school teachers greater protection against seniority-based layoffs—for two reasons, neither of which is applicable to the Richmond Minority Business Utilization Plan. First, the affirmative action measure in *Wygant* was designed to maintain a certain ratio between the percentage of minority teachers and the percentage of minority students. See 106 S. Ct. at 1847 (plurality opinion); *id.* at 1857 (opinion of O'Connor, J.) As several Members of the Court pointed out, any disparity between these two

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[6] The court of appeals acknowledged this aspect of the ruling in *Wygant*. See J.S. App. 8a. But the court of appeals' illustrations of the kinds of evidence that it would require before concluding that the City had a "firm basis" reveal that in fact it insisted on far more specific findings of prior discrimination than any of the opinions in *Wygant* would have required in this case. See J.S. App. 8a: "There has been no showing that qualified minority contractors who submitted low bids were passed over. There has been no showing that minority firms were excluded from the bidding pool."

percentages is simply not probative of discrimination in the hiring of teachers. See *id.* at 1847 (plurality opinion); *id.* at 1857 (opinion of O'Connor, J.). By contrast, as we have explained, Richmond relied on a dramatic statistical disparity that is highly probative of discrimination.

Second, the affirmative action plan in *Wygant* resulted in layoffs of non-minority employees whose seniority would otherwise have protected them. This aspect of *Wygant* was crucial to the outcome of that case. See 106 S. Ct. at 1849-1852 (opinion of Powell, J.); *id.* at 1857-1858 (White, J., concurring in the judgment). See also *id.* at 1857 (O'Connor, J., concurring). Members of the Court stressed the hardship that such layoffs inflict and compared it to the more "diffuse burden" imposed by affirmative action in hiring and school admissions. *Id.* at 1851 & n.11 (opinion of Powell, J.).

The burdens imposed on non-minorities by the Richmond Plan are in no way comparable to those imposed by affirmative action in layoffs; at most, they resemble the burdens that may result from affirmative action in hiring. See *Fullilove*, 448 U.S. at 484-485 (opinion of Burger, C.J.); *id.* at 514-515 (Powell, J., concurring). There is no reason to believe that any burdens imposed by the Richmond Plan on non-minority businesses will be concentrated on a few enterprises. And far from uprooting settled expectations acquired through years of seniority, the Richmond Plan threatens only the contingent possibility of future economic gain—an interest that, as this Court has emphasized, is entitled to only minimal legal protection. See, *e.g.*, *Andrus v. Allard*, 444 U.S. 51, 66 (1979); cf. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 778 (1976).

4. The court of appeals' decision has very substantial implications for state and local governments, and for the values of federalism. Literally hundreds of state and

local governments have minority set-aside programs comparable to the Richmond Plan. As we have noted (Motion and page 5, *supra*), the legislative "records" of many of these programs were developed in reliance on *Fullilove*. The unreasonable and impractical nature of the requirements imposed by the court of appeals in this case is, therefore, likely to threaten a large percentage of these programs.

In addition, many federal grant programs contain minority set-aside requirements with which state and local governments must comply if they are to receive federal funds. See Motion note 5 and accompanying text, *supra*. The effect of the court of appeals' decision is to establish a double standard: federal programs, including those with which state and local governments must comply, are judged under *Fullilove*, while the programs of state and local governments themselves must meet much more burdensome requirements.

Consequently, if the court of appeals' approach prevails, state and local governments—the governments most familiar with both the problems of past discrimination and the best means of remedying it—will often be precluded from taking the remedial action they consider most appropriate; but they will be required to implement remedial measures designed by the remote and less knowledgeable federal government. This substantial and unwarranted adverse impact on the values of federalism is in itself a sufficient reason for plenary review in this case.

CONCLUSION

Probable jurisdiction should be noted.

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No. 87-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J. A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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JOINT APPENDIX

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April 21, 1988

JURISDICTIONAL STATEMENT FILED DECEMBER 17, 1987
PROBABLE JURISDICTION NOTED FEBRUARY 22, 1988

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

No. 84-0021-R

J.A. CROSON COMPANY,
Plaintiffs

v.

CITY OF RICHMOND,
Defendants

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1984		
Jan. 12	1	Petition for Removal, filed. apc
Jan. 12	2	Notice of Filing of Petition for Removal, filed. apc
Jan. 18	3	Pltf's Motion for Preliminary Injunction, filed. apc
Jan. 18	4	Pltf's Memorandum in Support of Motion for Preliminary Injunction, filed. (exhibits attached & one transcript as exhibit) apc
Jan. 19		IN OPEN COURT: MERHIGE, J. HALASZ, OCR APPEARANCES: PARTIES BY COUNSEL. MATTER CAME ON FOR HEARING ON PLTF'S MOTION FOR A TRO. MOTION HEARD; DENIED. ORDER TO ENTER. CASE SET FOR TRIAL ON 2-20-84 AT 2 PM. (55 MINS.) JWH
Jan. 23	5	ORDERED that Pltf's Motion for Preliminary Injunction is DENIED. ENT 1-23-84, RRMjr, and filed. Copies mailed. mkh

DATE	NR.	PROCEEDINGS
1984		
Jan. 25	6	Pltf's Notice to Take Deposition of Melvin Brown & production of documents, filed. Subpoena issued. apc
Jan. 27	7	Deft's Motion to Dismiss, filed. apc
Jan. 27	8	Deft's Memorandum of Law in Support of Motion to Dismiss, filed. apc
Feb. 3	—	Records rec'd fr. Melvin Brown, Pres. of Continental Metal Hose purs. to subpoena *duces tecum* of 1/26/84. (in brown expandable) apc
Feb. 6	—	Records rec'd fr. Melvin Brown 2/03/84 purs. to deposition subp. & subp. *duces tecum* picked up by Mr. Brown. apc
Feb. 8	9	Pltf's Memorandum in Opposition to Motion to Dismiss, filed. apc
Feb. 10	10	Deft's Motion for Partial Summary Judgment, filed. apc
Feb. 10	11	Deft's Brief in Support of Motion for Partial Summary Judgment, with attached (located in brown expandable folder), filed. apc
Feb. 17	12	Pltf's witness list, Filed. afw
Feb. 17	13	Deft's Motion for Sum. Judg., filed jlm
Feb. 17	14	Deft's Memo. of Law in Support of Motion for Sum. Judg., filed jlm
Feb. 17	—	Telephone Deposition of Elsie C. Slaton taken 2-9-84, recd jlm
Feb. 17	—	Deposition of Donald M. Sparrow taken 1-30-84 on behalf of deft, recd jlm
Feb. 17	—	Deposition of Wallace Green taken 2-15-84, recd jlm

DATE	NR.	PROCEEDINGS
1984		
Feb. 17	—	Telephone Deposition of Curtis W. Johnson, recd jlm
Feb. 17	—	Deposition of Eugene Bonn, recd jlm
Feb. 17	15	Stipulated Exhibits of the Parties, filed (List, with exhibits in brown binder) jlm
Feb. 17	16	Pltfs' Cross-Motion for Partial Sum. Judg., filed jlm
Feb. 17	17	Pltfs' Memo. in Support of Cross-Motion for Sum. Judg., filed jlm
Feb. 17	—	Depositions of Vernon Forest Williams, Jr., Harold R. Wall, Donald G. Clark, Chris W. Stevens, Jr. & Alfred E. Smith on 2-6-84, recd jlm
Feb. 20	18	Pltf's Proposed Findings of Fact, filed jlm
Feb. 20		IN OPEN COURT: MERHIGE, J. HALASZ, OCR APPEARANCES: PARTIES BY COUNSEL. MATTER CAME ON FOR HEARING ON PLTF'S MOTION FOR A PRELIMINARY INJUNCTION. PLTF ADDUCED EVIDENCE IN SUPPORT OF THE MOTION. MATTER TAKEN UNDER ADVISEMENT. JWH
Feb. 23	18	Pltf's Motion to Admit Stipulation of Evidence, filed. apc
Feb. 23	19	Stipulation of Evidence, filed. apc
Feb. 23	—	Stipulated Exhibits, rec'd. apc
Feb. 24	20	Deft's Notice of hearing on motion to dismiss scheduled 3/12/84 at 8:30 a.m., filed. apc
Feb. 24	21	Deft's Memorandum in Opposition to Pltf's Cross-Motion for Partial Summary Judgment, filed. apc

DATE	NR.	PROCEEDINGS
1984		
Feb. 24	22	Pltf's Reply to Deft's Motion for Summary Judgment, filed. apc
Feb. 24	23	Pltf's Motion for Summary Judgment, filed. apc
Feb. 24	24	Pltf's Memorandum in Support of Motion for Summary Judgment, filed. apc
Feb. 27	25	ORDER, that Stipulation of Evidence is admitted into evidence, ENTERED by RRMjr on 2/27/84 & filed. Copies mailed to counsel. apc
Mar. 12		IN OPEN COURT: MERHIGE, J. HALASZ, OCR APPEARANCES: PARTIES BY COUNSEL. MATTER CAME ON FOR ARGUMENTS ON MERITS AND HEARINGS ON MOTIONS. CITY RICHMOND'S MOTION TO DISMISS DENIED. ARGUMENTS ON MERITS AND CROSS MOTIONS SUMMARY JUDGMENT HEARD. CASE TAKEN UNDER ADVISEMENT BY THE COURT. (1 HR. 29 MINS.) JWH
Dec. 3	26	ORDER that judgment be and is hereby entered in favor of the defendant City of Richmond and it stands dismissed with its taxable costs, motions of the City of Richmond for counsel fees be and are DENIED, ent. 12-3-84, RRMjr, filed. Copies mailed. jlm
Dec. 3	27	Court's Memorandum, filed. jlm
Dec. 27	28	Pltf's Notice of Appeal, filed. Filing Fee Pd. TPO mailed. apr

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Docket No. 85-1002 (L)

J. A. CROSON COMPANY,
Appellant,

v.

CITY OF RICHMOND,
Appellee.

ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Amicus Curiae.

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
01/02/85	Case Docketed. Awaiting ROA. (db)
01/08/85	Transcript Purchase Order rec'd by G. Halasz 01/08/85, filed. (db)
01/16/85	ORDER consolidating 85-1002(L) and 85-1041, filed. (db)
01/16/85	DISCLOSURE STMNT, E, N, filed. (db)
01/17/85	DISCLOSURE STMNT, A (85-1002), N, filed. (db)
01/17/85	DISCLOSURE STMNT, E (85-1041), N, filed. (db)
01/24/85	DISCLOSURE STMNT, A (85-1041), N, filed. (db)
02/06/85	BRIEFING ORDER, filed. A due 03/18/85. Oral argument tentatively set for Summer 1985 session of Court. (db)

DATE	FILINGS—PROCEEDINGS
02/15/85	DESIGNATION, A,—parts to be included in the appendix, filed. (db)
02/21/85	DESIGNATION, E,—parts to be included in appendix, filed. (db)
3/18/85	MOTION of Associated General Contractors of America (C-69) for leave to file as amicus curiae, filed. jd
03/21/85	DESIGNATION, E,—parts to be included in appendix, filed 2/15/85. (db)
3/26/85	REPLY (C-69) of A J. A. Croson Company to motion to file as amicus curiae, filed (DHB:nac)
4/2/85	RESPONSE of City of Richmond to motion C-69, filed. jd
4/3/85	ORDER granting motion C-69. (BMM:jd) Copy to counsel.
04/18/85	DISCLOSURE STMNT, (amicus curiae), N, filed. (db)
6/6/85	MOTION of E (F-48) to dismiss A Corson's appeal, filed. jd
6/10/85	ORDER denying motion F-48. (BMM:jd) (Copy to counsel.
07-03-85	MOTION (G-24) and memorandum in support of motion to file supplemental joint appendix, filed (BMM:cw)
7/8/85	MOTION G-24, memorandum in support of motion and conditionally submitted jt apx transmitted to KKH/JMS/JHW. (BMM:jd)
7/16/85	ORDER granting motion G-24 to file supp. apx. (BMM:jd) Copy to counsel.
12/13/85	MOTION (M-103) for stay of mandate of A, filed (DB:nac)

DATE	FILINGS—PROCEEDINGS
12/17/85	ORDER denying A's motion for stay of mandate, filed (DB:nac) Copy to Ryland; Barley-Sarahan; Kennedy
07/09/86	U.S. Supreme Court order dated 7/7/86 granting cert., vacating and remanding to Fourth Circuit for further consideration in light of decision in Wygant vs. Jackson Board of Education, 476 U.S.—(1986); filed. lgs
7/10/86	TRANSMITTED order of Supreme Court to panel KKH, JMS, & JHW, BMM:cb
08/18/86	Judgment of U.S. Supreme Court dated 7/7/86; filed. lgs
08/19/86	TRANSMITTED judgment of U.S. Supreme Court of JMS, KKH, JHW, BMM:cb
11/13/86	SUPPLEMENTAL AUTHORITY submitted by A, filed. BMM:cb
	TRANSMITTED to KKH, JMS, JHW
3/5/87	MOTION (F-3) of A for a briefing order, filed. SAR:gac Transmitted to JMS/KKH/JHW on 3/5/87).
7/21/87	Appellant's bill of costs filed. mb
7/23/87	PETITION for Rehearing w/Suggestion for Rehearing In Banc filed by E, BMM:cb
7/23/87	MOTION of National Lawyers Committee for Civil Rights Under Law for leave to file a brief amicus curiae in support of E's pet. for rehearing and sug. for rehearing in banc and conditionally submitted brief filed, BMM:cb
7/24/87	Transmitted Petition for rehearing with suggestion for rehearing in banc and motion of National Lawyers Committee and conditionally submitted brief to panel, transmitted petition for rehearing & suggestion for rehearing in banc to all active circuit Judges, BMM:cb

DATE	FILINGS—PROCEEDINGS
8/12/87	A's answer to petition for rehearing w/suggestion for rehearing in banc, filed. BMM:cb
8/14/87	TRANSMITTED A's answer to all active circuit judges. BMM:cb
9/18/87	ORDER denying pet. for rehearing & sugg. for rehearing in banc, and FURTHER ORDERED the the motion of the National Lawyers Committee for Civil Rights Under Law for leave to file brf as amicus curiae is granted, filed. SAR:gac Copies to Kennedy; Sarahan-Carneal; Ryland.
0/24/87	MOTION of City of Richmond for stay of mandate, filed. SAR:gac
9/25/87	Transmitted motion of City of Richmond for stay of mandate to JHW/JMS/KKH w/copy to all active cir. judges on 9/25/87.
10-01-87	ORDER staying the mandate pending timely application of the E to the Supreme Court for a writ of certiorari, filed (SAR:cw) Copies to counsel.
10-01-87	ORDER filed *correcting* this Court's order filed 10-01-87, filed (SAR:cw) Copies to counsel.
11/18/87	NOTICE OF APPEAL TO SUPREME COURT, filed. Copy transmitted to Clerk, Supreme Court. (db)

RICHMOND CITY COUNCIL

IN RE: ORDINANCE NUMBER 83-69

HEARING ON ADOPTION OF MINORITY BUSINESS UTILIZATION PLAN

April 11, 1983

Richmond, Virginia

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[2] Appearances:

ROY A. WEST, Mayor

CAROLYN C. WAKE, Councilperson

HENRY L. MARSH, III, Councilperson

WALTER T. KENNEY, Councilperson

WILLIAM J. LEIDINGER, Councilperson

DREW GILLESPIE, Councilperson

G. S. KEMP, JR., Councilperson

HENRY W. RICHARDSON, Councilperson

CLAUDETTE BLACK MCDANIEL, Councilperson

WILLIAM H. HEFTY, City Attorney

MANUEL DEESE, City Manager

(The following transcript was produced from stenographic notes taken of the electronically-recorded procedings.)

MAYOR WEST: Call Item 21.

UNIDENTIFIED: Item 21, (inaudible) 369, amend Article 1, General Provisions Act, Part B, Definitions, Chapter 24.1 Procurement, Ordinance 82-294-270, adopted December 20, '82 of the Richmond City Code of '75, as amended, to add definitions of minority business contract to minority group members; to add in said Chapter a new article number, [3] Article 8A, Title Minority Business Utilization Plan.

MAYOR WEST: Mr. Richardson.

MR. RICHARDSON: Yes. This ordinance is—can be considered teeth to a philosophy that I think most Members of Council already adhere to. It is an ordinance that will require contracts let by the City of Richmond at least 30 percent of which be secured by minority vendors. We have not reached a successful or an admirable goal in terms of minority participation, and this paper will make it mandatory that the purchasing department and the administration conscientiously

take a greater effort in attempting to distribute (inaudible) of a 50 percent minority community, to have those dollars recycled back to minority businesses, in the interest of the entire community.

This is not a social paper. This is not a humanitarian paper. This is a paper based on good sound business practices that will help and assist the growth, the development, and the improvement of attitudes of all Richmonders, and I would wholeheartedly encourage all Members of the Council to support the adoption of this paper.

MR. DEESE: Mr. Mayor?

MR. RICHARDSON: This is 30 percent requirement, and there are a number of clauses in here that address the specifics, the regulations, and how it is to be carried out.

MR. DEESE: Mr. Mayor?

[4] MAYOR WEST: Mr. Deese.

MR. DEESE: Mr. Mayor, Members of the City Council, the administration conceptually concurs in the paper. However, I would ask if Mr. Richardson would be amenable to any adjustment that would have a dollar amount. I would specifically request a dollar amount coinciding with the dollar amount that we have in the current papers, bids over a certain amount, which, I think, is $10,000. Because, it could cause us somewhat of a problem, anything less than that, and I'd say over $10,000.

And the other request I would make, Mr. Richardson, we do know that in this paper, there is sufficient requirements for the administration to waive and provide, as long as an effort has been made, and that is similar to the CDBG project, and we're familiar with the project.

MR. RICHARDSON: Could you explain, again, why you would need that exception, because there is a clause written in to waive any contract where the minority vendor cannot be located, and the purchasing agent has been given the discretionary decision-making ability to determine those instances.

MR. DEESE: The only reason I was raising the dollar amount, for the ease of the administration. It would be better for us if we have a dollar amount, as opposed to all construction projects. I think very few of them would be below [5] the number that we're talking about, but I would think that it would help us in the ease of the administration and the paper if we had a dollar amount.

MR. RICHARDSON: Would it also—

MR. DEESE: Would the dollar amount—what, $10,000 as we have now in the current law.

MR. MARSH: Mr. Mayor?

MAYOR WEST: Mr. Marsh.

MR. MARSH: May I suggest that we could accomplish that when the regulations and guidelines are drawn up. It doesn't have to be spelled out in the paper. At the time the guidelines are drawn up.

MR. DEESE: As long as Members don't have to amend the paper.

MR. MARSH: That could just be provided in the guidelines.

MR. DEESE: Conceptually, we concur with the paper.

MR. MARSH: One other request that I have. We have the CDBG procedure and guidelines. I'm assuming they will be followed?

MR. DEESE: Yes. We have the same guidelines and we don't see any major problem with this.

MAYOR WEST: Mr. Richardson, is there any mandate in this paper that a contractor who would contract with [6] the City would have to go out and get a subcontractor, but if, on the other hand, if that were needed, then he would have to—are you saying now that every contractor has to subcontract at least 30 percent of the work out?

MR. DEESE: He must make a bona fide, good effort to accommodate the requirement of the law. There are provisions that we use in CDBG. If they're not suc-

cessful, then it ultimately comes to me. And I make the determination whether or not there's been a good faith effort.

MAYOR WEST: My question is, suppose this is a turnkey contractor, who can do the job from A to Z; is he still forced out onto the market?

MR. RICHARDSON: No, he's not. There's some emergency provisions in there that—

MAYOR WEST: That's what I'm asking. If he can do everything from A to Z, does he still have to subcontract any of that work?

MR. RICHARDSON: No, he does not have to. But, this is an across the board 30 percent, that wherein some cases, we may not meet any more than one, two, three or four percent. Hopefully, we would compensate by, in some areas, increasing the minority participation and on balance, at the end of the year, we would have acquired a 30 percent utilization.

MAYOR WEST: Once again, the question is, where [7] there is subcontracting required, we have to do that to 30 percent, is this what you are saying?

MR. RICHARDSON: Yes.

MAYOR WEST: One other question. Why was there an expiration date of 1988 on this thing? I thought this would be something that we were going to perpetuity with.

MR. MARSH: That was on advice of counsel. I think there are advantages—

MR. HEFTY: The reason for that and the suggestion that a date be put in, was that the federal cases that approved this sort of set-up have said that it's remedial legislation, and the purpose is to remedy past discrimination. And hopefully, in some period of time, this program will cause that to happen. Five years was deemed to be a period of time with which that would happen in all likelihood. It can be judged at that time and either continued—it may expire before that. It's an ordinance that can be amended by Council at any time. That was deemed to be a fair date to evaluate the

effects of the program, rather than leave it open-ended.

MR. LEIDINGER: Mr. Hefty—

MAYOR WEST: Mr. Leidinger.

MR. LEIDINGER: Mr. Hefty, if I may, you've indicated a viewpoint taken by the Courts in cases where legislation like this has been approved. And, on page 10, line 16—if that is line 16—we say this article is [8] remedial. You having said that as legal advice, and that language being in the ordinance, are we acknowledging it's remedial for that purpose, and thus, exposing ourselves to liability?

MR. HEFTY: No, I don't feel that we're exposing ourselves to liability, but the Supreme Court, when it approved the ten percent minority set-aside, specifically said that the justification was that it was remedial. We've reviewed the statistics of the construction contracts, and it certainly justifies that. We have tried to tailor this ordinance as closely to the federal ordinance, which was—or federal statute, which was upheld by the Supreme Court, as possible. And, yes, it is remedial. I don't think that's exposing us to any liability for prior acts.

MR. LEIDINGER: Question. Doesn't the word remedial mean to make special efforts at the moment and in the near future to make up for prior deficiencies?

MR. HEFTY: Yes. In the term remedial, we're not just implying that the City was intentionally discriminatory in the past. What we're saying is there are statistics about the number of minorities that were awarded contracts in the past which would justify the remedial aspects of the legislation. We're not saying there was intentional discrimination in any particular case. Surprisingly, or maybe not so surprisingly, when the Supreme Court dealt with this issue, they allowed [9] evidence of general discrimination—at least discriminatory effect in the entire industry—construction industry. And they allowed more use of broader statistics than they do in a lot of cases. I'm not saying that we have discriminated in any individual case in the past.

MR. LEIDINGER: In civil rights legislation, is not statistical evidence prima facie evidence?

MR. HEFTY: It is evidence. I mean, whatever the statistics are, they are. We are not changing the statistics. If you look at what the City has done in procurement over the last few years, the statistics are the statistics, and they cannot be changed.

MR. LEIDINGER: Has the U.S. Supreme Court or any federal Court or state Court which has jurisdiction, if you will, over the City of Richmond, addressed to set aside beyond ten percent?

MR. HEFTY: No, not that I can find.

MR. LEIDINGER: Approved or addressed?

MR. HEFTY: I could not find a case in which it was addressed.

MR. LEIDINGER: Thank you.

MR. HEFTY: There was a recent Supreme Court case which was decided in last month, involving Boston, where Boston had a 50 percent set-aside for construction contracts requiring Boston contractors, City residents, to receive 50 [10] percent of the business. That was upheld at least on commerce clause grounds, possibly not on equal protection grounds. But, to answer your question directly, I could not find any case above ten percent.

MR. RICHARDSON: Mr. Mayor?

MAYOR WEST: Mr. Kemp and then Mr. Richardson.

MR. KEMP: Mr. Deese, what is our present experience?

MR. DEESE: Right now, I think we are probably still under ten percent. I don't have the exact statistics, but it's still under about ten percent. We do better on CDBG than we've done on the other projects.

MR. KEMP: Is it near ten percent, or—

MR. DEESE: The CDBG?

MR. KEMP: Overall.

MR. DEESE: I think it was somewhere between seven and eight on the overall—on general City contracts. And then CDBG, I think we pushed closer, in the 20's, somewhere between 17 and 22, I believe.

MR. RICHARDSON: Mr. Mayor?

MAYOR WEST: Mr. Richardson.

MR. RICHARDSON: Before we further any Council debate, could we indulge in the public hearing and then get back to—

MAYOR WEST: I wanted to make sure all questions [11] were answered, and then we can discuss later. Anyone to speak in favor of this paper, come forward, please.

MR. RICHARDSON: And Ms. Cooper, we want to apologize for keeping you here all night, watching us over the community development block grant funds.

MAYOR WEST: She's quite conversive with the process of government.

MS. COOPER: Mr. Mayor, Council, my name is Esther Cooper. I head a small minority corporation here in Richmond called Esther Cooper and Associates. We are a temporary employment placement people. I am here also to represent the Maymont Civic League. And we are in support of this ordinance of the 30 percent set-aside.

We are aware of the fact, as minorities—and I am a double minority—that the exclusionary process is often very subtle, and we cannot put our fingers on it. However, from time to time, as we market daily on the sidewalks of Richmond, we are exposed to not doors being slammed in our faces, but a kind of closed atmosphere to entertaining new companies and new ideas and new vendors here in the Richmond area.

For example, last year we had the occasion to visit one company five times before we were even allowed to do business with them. On our fifth occasion going there, a vice president said to us, well, the National Football League did [12] not settle their dispute in one meeting, so you must learn to negotiate four, five, even a dozen times. We're not marketing on an inferior product. We are marketing a standard product that is very similar to our competitors'.

I'm here speaking for contractors. True, I am not a contractor. I do not hire construction people. But, I would not let this opportunity pass without saying that if you can give us access to the enterprise system, we want it. We're not asking to come in as second-class or second-rate service folk. We're asking to come in as first-rate service folk, but to allow us access. Thirty percent is not one hundred percent. There is still seventy percent left over.

We, the Maymont Civic Association and myself as a citizen of Richmond City, living here and with a business in the City of Richmond, support this ordinance. We are in support of Mr. Chuck Richardson and the 30 percent for contractors. Even though we will not reap the benefits of it immediately, we cannot let the opportunity pass. We support Councilman Richardson and the ordinance. Thank you very much.

MAYOR WEST: Thank you. Anyone else to speak in favor of this paper? Anyone to speak in opposition?

MR. RAY: My name is Freddie Ray, and I'm the president of the task force for historic preservation in minority communities. I did not know that this paper was going to be presented, and it's a bit ahead of our newsletter, [13] which will be published by the end of this month, where we speak specifically about economic development and specifically about the development of minority businesses.

I would like to refer this Council to actions that have been taken in Oakland, California; Cleveland, Ohio; and Toledo. In Oakland, California, with a population—minority population of much less than 50 percent or 51 percent as we have in Richmond, Oakland has a 22 percent requirement of minority participation. This proposal, as I've heard it tonight, is rather limited, in that Oakland speaks not only of minority participation in contracting, but also talks about ownership and participation in the ownership of developments which are possibly funded by the City of Oakland.

The results have been tremendous. In one development, that is the development of a Hyatt hotel in Oakland, eight percent of the ownership of that hotel was, in fact, given to minority organizations. The result has been over 22 million dollars of investment and development within Oakland minority communities.

I can see no reason why this ordinance, as suggested by Mr. Richardson, should not be passed. I will suggest that we look at other ways of building and supporting economic development for minorities. Again, if I had known that this was being presented, I would have presented additional data about additional cities that do, in fact, include such an [14] ordinance. I think this is a step in the right direction; a little slow, but we're beginning to move, grow and develop as a city. Thank you.

MAYOR WEST: Do we have anyone else to speak in favor of this paper? Anyone to speak in opposition to the paper?

MR. WATTS: Good evening. Mr. Mayor, Members of Council, my name is Stephen Watts. I am an attorney with the law firm of McGuire, Woods and Battle here in Richmond, and I'm appearing tonight on behalf of my client, Associated General Contractors of Virginia, or AGC, in opposition to proposed ordinance number 83-69.

AGC is a Virginia non-profit organization, composed of some 600 general contractors, subcontractors, material and service suppliers, located throughout Virginia. Over 130 of AGC's members are located in the Richmond area. I've also been asked to voice the support of the Builders Exchange of Richmond for the remarks that I'm going to provide tonight, and specifically, the presence here tonight of Mr. George Albright, who is executive secretary of that organization, and Mr. Tyree Chappell, who is the president.

The Richmond Builders Exchange is composed of approximately 675 general contractors, subcontractors, and material and service suppliers. They're all located in the Richmond area. AGC's purpose is to promote the common

interest [15] of the industrial and commercial contracting industry in Virginia. In addition to their work in the private sector, AGC's members are extensively engaged in providing high quality construction services to public bodies at the lowest reasonable cost, including services to the City of Richmond.

One of AGC's principal aims is the establishment of fair and nondiscriminatory competitive bidding practices for public construction projects. Although proposed ordinance number 83-69 only came to AGC's attention within the last several days, they've asked me to explain to you their legitimate reasons for opposing passage of the ordinance and for urging that it be defeated.

Simply stated, AGC believes the ordinance represents bad policy and may be unlawful. AGC is opposed to any classification or preference based on race in the awarding of public construction contracts. AGC and its national affiliate, the Associated General Contractors of America, are on record in many forums as opposing racial discrimination as a matter of public policy. It is an axiom, however, of simple supply and demand economics that institutionalized restriction of access to the bidding process on public construction projects will result in higher construction costs to the public body and to its taxpayers. The effect of this ordinance will be to exclude nonminority contractors and subcontractors from a significant portion of the total dollar [16] value of Richmond's construction projects.

Based on experience, we believe the passage of this ordinance will necessarily result in higher bids, because the unrestricted forces of competition will not be available to keep bid prices down. In addition, the ordinance will have the effect of creating an unfair competitive advantage for nonminority contractors by excluding them from bidding on a substantial portion of public contracts. As I said, AGC strongly believes that unrestricted competitive bidding should be used on public contracts to insure free access to the bidding process for all potential bidders.

This is not a Court and I'm not here to make a legal argument to you, but I do want to express my concern that in addition to the unfortunate policy that would be established by this ordinance, it may well be unlawful under Virginia law. Our Supreme Court has said in a number of cases, and I quote, "that a municipal corporation possesses and can exercise only those powers granted in express words by statute or charter, those necessarily or fairly implied or incidental to the powers expressly granted, and those essential to the declared object and purpose of the municipal corporation. Not those that are simply convenient, but those that are indispensable."

Moreover, if an asserted power has not been expressly granted, or even if it's doubtful, the doubt must be [17] resolved against the exercise of the power. This doctrine is commonly known as the Dillon rule. In an opinion dated February 23, 1979, concerning the proposed human rights code for the City of Richmond, the Richmond City Attorney stated, and he cited the Dillon rule, "in the absence of a countervailing State policy, such as that of the Virginia Fair Employment Practices Act—excuse me, Contracting Act, a political subdivision can enact no requirement impairing competition in the letting of its contracts."

The sense of this opinion was recently confirmed in an October, 1982, opinion of the Attorney General of Virginia, regarding certain amendments to the Human Rights ordinance of the County of Fairfax. I can have copies of these documents available, if you wish. The Virginia Fair Employment Contracting Act not only fails to provide any such countervailing public policy, but specifically states in Section 2.1-376.1, and I quote, "in the awarding of contracts, no contracting agencies shall discriminate because of race, religion, color, sex or national origin." In Section 2.1-378 of the State Code, it is specifically provided that nothing in that portion of the Code shall be deemed to empower any agency to require any contractor to grant preferential treatment to or discriminate against any individual or any group because

of race, color, religion, sex or national origin, or account of any imbalance between the racial makeup of the contractor's [18] employees, compared with the number or percentage of such race in any community or in the State.

Moreover, the Virginia Public Procurement Act, which is found in Chapter 7 of Title 11 of the Virginia Code specifically precludes public bodies in the Commonwealth from excluding qualified vendors from access to public business, and provides that competition in procurement is to be sought to the maximum extent feasible. So, the proposed ordinance, at least in my view, appears to be in conflict with established State law, and I'm not aware that the City of Richmond has obtained specific approval from the General Assembly for such an ordinance.

Moreover, it appears to be in conflict with the City's existing procurement ordinance, contained in Chapter 24.1 of the City Code. In Article 8 of that chapter, discrimination in the award of contracts is specifically prohibited. "In the solicitation or awarding of contracts, the City shall not discriminate because of race, religion, color, sex or national origin of the bidder or offeror."

MAYOR WEST: Sir, could you summarize in a minute?

MR. WATTS: Yes, I am concluding right now.

MAYOR WEST: All right.

MR. WATTS: I am also aware of at least two recent instances in which the Alabama Supreme Court and a [19] federal Court in Ohio had struck down similar commercial set-aside provisions as being unconstitutional reverse discrimination. It's my understanding that in those cases, the ordinances offered were not able to withstand the constitutional test of strict scrutiny, which is applicable to any governmentally established classification or preference based on race.

For these reasons, AGC must oppose the proposed ordinance, and respectfully urges that it be defeated. Thank you very much for providing me an opportunity

to appear before you tonight. I'll be happy to attempt to answer any questions you might have.

MR. GILLESPIE: Mr. Mayor?

MAYOR WEST: Mr. Gillespie.

MR. GILLESPIE: While Mr. Watts is here,—

MS. WAKE: We need the rule suspension.

MR. DUFFEY: 11 o'clock. Mr. Gillespie?

MR. GILLESPIE: Aye.

MR. DUFFEY: Mr. Kemp?

MR. KEMP: Aye.

MR. DUFFEY: Mr. Kenney?

MR. KENNEY: Aye.

MR. DUFFEY: Mr. Leidinger?

MR. LEIDINGER: Aye.

MR. DUFFEY: Ms. McDaniel?

[20] MS. McDANIEL: Aye.

MR. DUFFEY: Mr. Marsh?

MR. MARSH: Aye.

MR. DUFFEY: Mr. Richardson?

MR. RICHARDSON: Aye.

MR. DUFFEY: Ms. Wake?

MS. WAKE: Aye.

MR. DUFFEY: Mr. Mayor?

MAYOR WEST: Aye.

MR. DUFFEY: The ayes have it.

MR. GILLESPIE: Mr. Mayor?

MAYOR WEST: Mr. Gillespie.

MR. GILLESPIE: This is—we'll all try together to come to oneness of this community. This is very much in keeping with that. But on the other hand, I sure am getting tired of spending all our City's time and money in Court, and I think you can see where this might be headed. I know this is not a Court of law, and I don't want us to get into a legal argument. The legality of this thing is something that I have been wrestling with myself, trying to decide in my own mind whether or not we're going to end up spending more of our money in Court. And I appreciate it if Mr. Hefty would maybe address some of Mr. Watts' legal concerns.

MR. HEFTY: Mr. Gillespie, regarding the State law issues, whether this is legal under Virginia law, Mr. Watts [21] did not cite a Supreme Court case from the Virginia Supreme Court, because there isn't one that's addressed it. And the problem that we have in many areas of local government law is that there's different Supreme Court cases on the subject, and we have a hard time deciding exactly what the law is.

The General Assembly has had these issues before them. They have not resolved them by passing legislation that might resolve the issue clearly on its face. The Public Procurement Act, which is the act that allows us to—in effect, requires us to follow its procedures, has two provisions which I think are relevant. 11-44, which we have adopted in our Public Procurement Act, says that discrimination shall not be allowed on the basis of race. Section 11-48 says that all public bodies may establish programs consistent with all provisions of this chapter to facilitate the participation of small businesses and businesses owned by women and minorities in procurement transactions. Now, what "facilitates the participation of businesses owned by women and minorities in procurement transactions" means exactly has not been determined. I don't think that the anti-discrimination provision applies to this ordinance, due to the fact that it's remedial legislation. I don't view what we're doing as being discrimination. The Supreme Court when it had the follow up case before it in 1980, when it adopted the ten percent minority set-aside, dealt with the same issues, that higher [22] bids would be required to nonminorities who did not engage in any intentional discrimination on their own, would be subject to this and might lose bids.

All of those issues were addressed, and the U.S. Supreme Court didn't have any problem with them. Now, Mr. Leidinger's point is well-taken; I don't know of any case where 30 percent has been addressed at all. And I could not guarantee that this would win in Court. But, as far as being able to defend it, I feel very comfortable

with defending it under both Virginia law and federal law. Anything these days are subject to—

UNIDENTIFIED: Mr. Mayor?

MR. GILLESPIE: I haven't yielded the floor yet. We felt comfortable—I wasn't here, but apparently this Body felt comfortable—here we are, we find ourselves establishing law for the whole country. I just hate for us to put ourselves in that position, again. I mean, we're going to run out of money before long. I don't know—believe me, I am not trying to kill that thing, Mr. Richardson.

UNIDENTIFIED: I can see that.

MR. GILLESPIE: I haven't yielded. Would it hurt to have a two-week or 30-day delay, so that we could have an executive session and discuss this thing, the legal aspects of it. Maybe even with outside counsel. And when I say that, I'm not doubting Mr. Hefty's judgment or integrity, but there [23] are people who are experts in this field, I assume, and, you know, I just think we might be in the area where we might want to have a little more advice. Have an executive session to discuss this legal matter and see where we are.

MR. MARSH: Mr. Mayor?

MAYOR WEST: Mr. Marsh, ask for the floor.

MR. MARSH: I would oppose Mr. Gillespie's suggestion of continuance, and I think that Mr. Hefty's legal analysis was correct. We have extremely competent legal counsel representing the City, and I think that it's not quite fair to suggest that we don't. And I would oppose any continuance. I think that based on discussion and a study of the appropriate cases, the Richmond ordinance that is proposed is clearly constitutional. It is within the confines of the cases of the Supreme Court of the United States, and I have no doubt whatsoever that it's legal, and I would urge Council not to postpone this matter. I might suggest that the only thing that would result from the kind of procedure that Mr. Gillespie recommended would be delay and perhaps further legal expo-

sure because of the differences that might exist on this Council on this matter.

MR. GILLESPIE: Was it a 30-day delay, so that—

(Inaudible discussion.)

[24] MR. MARSH: The paper has already been delayed some—

MR. GILLESPIE: Yes, and I understand why it was postponed when it was pulled one time before because of legal concerns. Now, I have not been privy to the legal discussions about this. All I'm saying is I don't believe that a 30-day delay so that I, and maybe anybody else who worried about it, can satisfy themselves with the legal aspects of this thing. As it stands now, you put me in a position to have to vote against something that I'm in favor of, because I'm not sure what kind of legal grounds you stand on. I don't think a 30-day delay is going to hurt your program at all.

MR. MARSH: I would oppose—as co-sponsor, I would oppose any delay.

MAYOR WEST: Mr. Richardson.

MR. RICHARDSON: This would constitute the third —Mr. Gillespie, while I certainly would want to believe any honorable intent you might have, the results may be to further inflame any differences that are out there lingering, give them an opportunity to come to a head, give them an opportunity to show those spaces of further dividing this City. You and I, even with all the books of the Supreme Court, may ultimately differ on this issue. So, we're not going to resolve it, I don't think, regardless of how much time we go over it. We have had a number of sessions with Mr. Hefty, [25] going over—as I said, Mr. Gillespie, this matter is being deferred, or would be deferred three times, and within that time period, any decent level of interest would have prompted your investigation and you could have had the same discussions with Mr. Hefty as the co-patron of this paper, and myself as a patron.

Mr. Hefty—and I'm not going to question his expertise. I think he is as qualified as many other attorneys

that might be able to advise us, and I'm going to support this paper and urge that it not be deferred, on the weight of his legal advice. And he has advised us, based on pulling a number of cases and comparing them, that this is legal. And that remedial action in this case, in this instance, does not constitute reverse discrimination. And I think the statistics would embarrassingly reflect the need for such a paper.

MR. MARSH: Mr. Mayor?

MAYOR WEST: Mr. Marsh.

MR. MARSH: I have some questions of the gentleman, if we can let him go after we finish. Would you—you indicated that one of the organizations you represented, Associated General Contractors, had 600 general and subcontractors in Virginia?

MR. WATTS: That's correct.

MR. MARSH: What number of that 600 would be black?

[26] MR. WATTS: At the moment, I think the answer to that question is none. There have been some in the past. There are none now.

MR. MARSH: Now, the other organization you represent, the Builders Exchange of Richmond, 675 general and subcontractors in the Richmond area. What of that number would be black?

MR. WATTS: Maybe I can clarify that. First of all, I don't represent them. I was simply asked to tack them on in my remarks.

MR. MARSH: Well, the same question pertains. What number would be black?

MR. WATTS: I don't know the answer to that. I am advised there are black members of the Builders Exchange. I don't know how many.

MR. MARSH: But, would you say very, very few?

MR. WATTS: I have no idea.

MR. MARSH: All right. Now, of the 130 of the Associated General Contractors in the Richmond area, how many of those are black?

MR. WATTS: Well, as I said, I don't think there are any black members of the organization now, so that would include those in the Richmond area.

MR. MARSH: Do you—have you contacted any minority organizations or minority contractors?

[27] MR. WATTS: No, sir. I represent the Associated General Contractors.

MR. MARSH: Okay. No further questions.

MAYOR WEST: Mr. Kenney.

MR. KENNEY: Mr. Watts, you indicated in your presentation in opposition to this particular paper, that one of the reasons why you on behalf of your clients were, because based on experience—bad experience, I believe. Did you say that? Based on—

MR. WATTS: I said based on experience.

MR. KENNEY: Based on experience. You're speaking specifically in Richmond?

MR. WATTS: No, sir. I'm speaking generally. That is, any time you restrict access to the bidding process and reduce the number of bidders who are able to make a bid, in my view and in the view of my clients, the simple laws of supply and demand will necessarily raise the price of the project.

MAYOR WEST: Are there further questions?

MR. LEIDINGER: Yes, sir, I had a question, Mr. Mayor.

MAYOR WEST: Mr. Leidinger.

MR. LEIDINGER: Mr. Mayor, Members of Council. Mr. Gillespie, I think the answer to your question is pretty simple. At least as I see it. Mr. Hefty's put his name on the [28] paper and said it's legal, period.

MR. GILLESPIE: Mr. Leidinger, Mr. Hefty also said that he would not guarantee a victory in Court.

MR. HEFTY: Mr. Gillespie, I said I could not guarantee a victory in Court in just about any case.

MR. LEIDINGER: Excuse me, Mr. Mayor. I thought I had the floor.

MAYOR WEST: All right, Mr. Leidinger.

MR. LEIDINGER: Mr. Hefty's put his name on this paper and he said it's legal. The person at the podium, Mr. Watts, has indicated that in his opinion, he doesn't think it is legal. I would suspect that AGC here in Richmond and here in Virginia, and I would just offer this as a speculative thought, would probably seek a declaratory judgment, seek an injunction, what have you, if this ordinance were adopted tonight.

MR. RICHARDSON: Only if you encourage them. Only if you're going to encourage them tonight. If you want to make that suggestion, you can take the floor and go ahead and ask them to.

MAYOR WEST: Mr. Leidinger, finish your comment, please.

MR. LEIDINGER: Thank you sir. I suspect that there may be a declaratory judgment sought, there may be an injunction sought by AGC, as AGC has done in other instances, [29] so it wouldn't be that novel or that new, if you would. On the other hand, I suspect that the ordinance, if acted upon tonight, is probably going to get the same number of favorable votes as it would have gotten two weeks ago, or as it might get two weeks from now. For my part, I'm prepared to act on the paper tonight, and if there are differences in interpretation of the law and who is right legally, I suspect there are other forums for us to find that out, and we'll find it out fairly shortly, if actions are initiated.

MAYOR WEST: Mr. Richardson.

MR. RICHARDSON: I just had a question for Mr. Watts.

MR. WATTS: Yes, sir.

MR. RICHARDSON: Mr. Watts, you quoted phrases like common interest and high quality and impairing the contract process, and yet, this City is 50 percent black and 50 percent white, and you represent an organization admittedly with no black participation whatsoever. I'm not in a Court and I'm not going to challenge you here tonight, but my conscience would advise you to take a copy of this ordinance back to your organization.

MAYOR WEST: Are there further questions?

MS. WAKE: Mayor West. Mr. Richardson, I think your remarks are highly out of order.

MR. RICHARDSON: Out of order? How would you—

[30] MAYOR WEST: Mr. Richardson.

MS. WAKE: I think they're ridiculous. I think when you say 50 percent black and 50 percent white in this City, it doesn't mean that we've got 20 percent black and 20 percent white contractors, or 20 percent white and 20 percent doctors. So, you—to me, there's no relevancy to what you're saying, and I think that's unfair.

And I have a real problem with the paper, because I reject this notion that because you're asked to go back, as this lovely lady said, four or five times, that that's because she's a minority contractor. I had that same experience as a businessperson, and it wasn't because of my race. It's because that's the way the system works, and that's the way you have to work to get in. And finally, you do get in the door. But, you don't, when you become a retailer, you know, walk in and demand the respect that the head of Miller and Rhoads and Thalhimers do. And it's the same thing with anything else.

And this man has made a valid point. You've got to have—it's going to be more costly. It's going to be terrifically more costly. And the thing that bothers me in situations like this, when you try to improvise and mandate by law what you think is fair and which I would like to see, too—I would like to see minority participation. But, I've known cases where what do you do? You get some smart white man [31] that gets a black front and he's the one that's pulling it all in. So, I don't think that we ought to think that we're going to pass a paper like this and change the world, which you and I both would like to see. It just isn't done.

But, I do believe that when you get out there and you work hard, that whether you're black or white, you are going to get a part of the pie.

UNIDENTIFIED: Well, we want to thank you for that.

MAYOR WEST: Is there anyone else to speak in opposition to this paper? May I see the hands of those who will speak in opposition? All right. Four, five. All right. Come forward, please. So that we may save as much time as possible, will those of you who are going to speak further, come down and take a seat on the front row, please?

MR. BECK: Mayor West, City Council, my name is Richard Beck. I'm vice president of a local Richmond plumbing, heating, cooling contractor. I am speaking tonight in behalf of the Richmond Plumbing, Heating, Cooling Contractors. I am the president of that association. I am also speaking as a representative of the 150 member Virginia State Plumbing, Heating, Cooling Contractor Association.

Competitive bidding without restriction insures construction of public projects at the lowest possible cost. At a time when public interest demands official responsibility [32] and spending restraints, it is unreasonable to carry forward programs which gain less than the fullest value in the use of citizens' tax dollars. To the extent that any City program or ordinance impedes the competitive process, its construction costs will increase ever higher.

Based on the research of our national plumbing, heating, cooling contractors association, they have found that based on public and private testimony, excessive cost, brokering of business and creation of fraudulent firms have occurred under this type of ordinance. Also, they have found that minority firms involved in this type of program have been mostly unsuccessful later in competing competitively in the private sector.

We, as plumbing, heating, cooling contractors, are very concerned by this proposed ordinance, in that instead of a general contractor awarding plumbing, heating, cooling work to a low bidder, he must consider awarding to a minority contractor, who may not be the low bidder, in order to meet the requirements of this ordinance. Therefore, the general contractor could have a higher bid

price due to not using the low bidders on 30 percent of the work.

We also question whether this ordinance has been researched to ascertain if minority contractors are available and qualified to perform City work of the percentages and magnitude proposed in the ordinance. Under State law, it [33] is unlawful for any firm, person, corporation, to engage in or offer to engage in general contracting or subcontracting in this State on a job of $40,000 or more unless he has been duly licensed under provisions of Title 54, Chapter 7, of the Code of Virginia. This is a class A license contractor requirement. We question the availability of minority contractors to meet this requirement. In addition, are the minority contractors available in sufficient numbers to perform the amount of City work involved? We question if minority contractors are available even to five to ten percent of City construction work.

In conclusion, we feel the ordinance goes against the State law of competitive bidding, and the City practices of purchasing on competitive basis on public construction work. We strongly recommend that you, as City Council, vote against this proposed ordinance 83-69. Thank you.

MAYOR WEST: Next speaker, please.

MR. SINGER: Mr. Mayor and Distinguished Members of the Council, my name is Mark Singer. I'm representing this evening the Virginia Chapter of the National Electrical Contractors Association and the Richmond area Municipal Contractors Association, a combined group of nearly 200 contractors that perform work in the Richmond area and throughout other parts of the State. I learned a lot, Mr. Mayor, about grants early on in the evening. In that [34] respect, I'm going to try and be as brief as I can in addressing this issue.

I think what Council has seen here tonight is a very grave concern on the part of many of us in the private sector concerning the proposal you have before us. Essentially, what we have here is a force-feeding type of

approach, with an arbitrary number of 30 percent tacked on. My clients have a concern, and essentially that concern is three-fold.

We do not believe that if this ordinance were passed, the 30 percent rule could be met locally. We believe that the quality of construction would suffer as a result of mandating contractors to perform work on certain contracts, and we believe that as a result of this reduced competition, construction costs in the City of Richmond would go up.

What is the requirement now? Mr. Mayor, I have to tell you, quite frankly, and Members of the Council, I have been unable to determine if, in fact, there is a requirement now, although I did hear Mr. Todd make reference to somewhere between seven and ten percent. Is the City comfortable with the 30 percent requirement without a fair and objective showing that any previous lower rate of set-aside has worked, and worked productively? Are the City and local contractors going to be put in a position of having to scour the State and perhaps even look outside of the State to be able to comply with the [35] 30 percent set-aside requirement? I can tell you, gentlemen and ladies, from experience, that our contractors have already had to do that, and have had to have looked as far as Maryland in the past in an effort to comply with these types of provisions.

In the final analysis, what is it that Council is really trying to accomplish by the adoption of this ordinance? I think clearly, to successfully bring disadvantaged contractors into the mainstream of the construction industry in the Richmond area. We don't believe that this force-feeding approach is the way to accomplish that goal. In fact, we believe the opposite may take place.

Contractors overextending themselves are a major cause of bankruptcies in this country, and I can tell you that the subcontractors that I represent are suffering greatly from bankruptcies. Set-asides tend to posture contractors in such a way so as to bid jobs that perhaps they really may not be able to perform. It's an apple sitting out

there, Members of Council, and it's one there's a great temptation to pluck. There's an illusory means of increasing minority participation in the construction market place. If the minority contractor cannot perform, the other contractors on a job suffer, the City suffers, and as a result, so do its residents.

I'm almost through, Mr. Mayor. We believe it [36] would be in the best interest of the City for this Council to vote against any set-aside, particularly one of the 30 percent magnitude. There are other options that we think may work better, certainly some other ways to consider the problem.

I would only like to add one thing, Mr. Mayor, in concluding my information. I have represented construction groups for about ten years, and have lobbied in the General Assembly for an equal number of years on their behalf. It's my understanding in terms of State law, that State law expressly prohibits set-aside contracts for State construction. I must admit some vagary in terms of how the Dillon rule applies in the situation we're faced with tonight, but I am quite confident that the State law does prohibit the set-aside provision of public contracts. Thank you for your time.

MR. MARSH: Mr. Mayor?

MAYOR WEST: Mr. Marsh.

MR. MARSH: I have one question for Mr. Singer. Of the 200 contractors, chapters you represent, how many are black, minority owned?

MR. SINGER: Mr. Marsh, I do not have the information for the Municipal Contractors Association. I would certainly be happy to obtain that for you promptly. For the Electrical Contractors, I have more of a full-time position with them. We have two contractors—we have three minority contractors, two black contractors and we have one application [37] pending for a minority contractor.

MR. MARSH: Out of how many?

MR. SINGER: Out of 81.

MR. MARSH: And how many would you say are in the other group?

MR. SINGER: I really do not know, sir.

MR. MARSH: You have no idea, whatsoever?

MR. SINGER: No, sir.

MR. MARSH: Thank you.

MAYOR WEST: Are there any more questions? The next person to speak in opposition.

MR. MURPHY: Mayor West and Members of Council, my name is Patrick Murphy. I am representing the American Subcontractors Association. We are opposed to this bill because we don't think it would be workable. To give you a little statistics, since we seem to be quoting them tonight, the latest Bureau of Census survey of minority business enterprises under the construction heading found that there were 4.7 percent of all construction firms in America are minority owned. Forty-one percent of that 4.7 percent are located in five states: California, Illinois, New York, Florida and Hawaii. The remaining 59 percent of that 4.7, or 2.8 percent of all construction firms, are divided between the remaining 45 states.

Now, what this means to us is that we need a [38] subcontractor that is a minority contractor. There's not very many around. The problems our members and the AGC members will have are as follows. First off, we have a problem of finding one or two to bid a project, to bid specific areas of work. We have trouble finding firms that are qualified and experienced to do the work. We have trouble finding firms that are financially capable of supporting the cash flow on major projects. We have trouble finding firms that are bondable. We have trouble finding firms that have the proper insurance requirements that can meet the project requirements.

We have had trouble in the past finding unreasonable pricing arrangements when they had set-asides, and I would like to give you an example of one case that I am personally involved with. A company set aside to meet their requirement approximately $195,000 worth of work on a waste water plant. Five minority firms were invited

to bid. Three never replied. One wanted to work only on a cost basis because he wasn't sure he could estimate correctly that volume of work. The one who did turn in a price for this $195,000 worth of work was $490,000, and was from out of State.

One problem we also have is that if we do go with this set-aside on any type of work for the City, we think it should be a City firm, or at least a State firm. In many cases, to find a qualified minority firm to do large projects or parts of large projects, we would have to go outside of the [39] State. We think that in the City, we should try to keep City work at least in Virginia. We feel that 30 percent is a very unreasonable amount to try to obtain. Does this bill—which we don't have a copy of —one other thing we have a problem with is, we don't know what we would do if we couldn't find a person or firm that was capable of bidding the work. Does that mean if we couldn't find 30 percent, we wouldn't be able to bid the work? That's all I have. And I know Mr. Marsh is going to ask me a question about how many of our members are minority.

MR. MARSH: Correct.

MR. MURPHY: But, I will tell you this—

MR. MARSH: No. Answer the question first.

MR. MURPHY: I don't know, Statewide. In the Richmond Chapter, I know of none. But, I can tell you how many have been turned down, none. Because, since I've been chairman of the membership committee, I have had none ask to become members.

MR. MARSH: How many members do you have?

MR. MURPHY: In Richmond?

MR. MARSH: Yes.

MR. MURPHY: Eighty.

MR. MARSH: And how many do you have Statewide?

MR. MURPHY: I'm not sure, Statewide.

MR. MARSH: I mean, about how many people?

[40] MR. MURPHY: I would say probably 150 to 200.

MR. MARSH: And you don't know of any minority?

MR. MURPHY: I don't know anybody in the other chapters, only the Richmond chapters. But, there have been none turned down.

MAYOR WEST: I gather from your presentation that you are not conversive with all of the provisions. Mr. Richardson or the clerk may want to provide you with a copy, because some of the questions that you asked are addressed in the paper, itself, and you need to get a copy of that paper.

MR. KENNEY: Mr. Mayor?

MAYOR WEST: Mr. Kenney.

MR. KENNEY: You indicated in your presentation of—as you perceive this particular ordinance would create problems insofar as bidders and what have you. In involving an employment civil rights act and so forth. I have heard that same argument in the past that minorities couldn't qualify for jobs, they couldn't qualify for certain higher educational institutions, they couldn't qualify for promotions. So, what you're saying is the same thing I heard during the '60's, that minorities, you just can't find qualified people. So, I think this is consistent with most individuals who are opposed to affirmative action, equal employment opportunities and what have you, and I appreciate—

[41] MR. MURPHY: I would not agree with you on that. The biggest problems we've had are the bonding and the financial capabilities, not the fact that we didn't want to use them. Thank you.

MAYOR WEST: The next person to speak in opposition, please.

MR. SHUMAN: Mr. Mayor, Members of Council, I am here—I'm Al Shuman. I am here on behalf of the Central Virginia Electrical Contractors Association, and also a new organization just formed in the City for the Richmond area. It's a Richmond chapter, actually. Professional Contractors Estimators Association. I can stand up here for the next 15, 20 minutes and repeat everything you've just heard. We're going to get nowhere

fast. I sat here tonight from 7 o'clock this evening until now, 11:25, and listened to everything that you people had to go through. I admire you.

But, now that I stand here, Mr. Marsh, you asked a question before, how many members are black that belong to all these organizations. The company I work for belonged to all these organizations. Nobody that I know of, black, Puerto Rican or any minority, has ever been turned down. They're actually sought after to join, to become part of us. Maybe we can help them and, therefore, help ourselves.

I am a minority, not recognized by the United States, I guess, because I'm Israeli. I feel I'm a minority [42] in many cases, but I also have the ability and aggressiveness to make something of myself, and I honestly speak for the two organizations that I sit here and I'm shaking a little bit because I heard you say, well, how many are black that belong. Well, quite frankly, I, myself, am on the membership committee of the Estimators Association. I went out and we got participation. How did we get it? Why don't you help us get members. We're looking for it. We ask for it. We want them to join us. The economic membership fees are not great. They're very reasonable. But, they don't come out. Are you trying to push them into something that they're not capable of doing? I don't think so. Do you want them to benefit themselves? Yes, you do.

Let's address some of the things you talked about tonight. You need money for additional well-worth causes. You're concerned, our City Manager's concerned, that the bidding process might cause some of these projects to go over the case by limiting the amount of bidding that's going to be done by certain companies because they can't get minorities to join them. Whether they're available—if they are, I'd like to see that list of minority firms that are available in the City. Especially, to help us out when we bid. If they're not available and the bidding price goes up, would that not limit the amount of programs

you will be able to do this forthcoming year. I think it will.

[43] Bidding one hundred percent open to the public means one hundred percent participation if they want to. Bids are opened publicly. They're available for anyone. In most cases, you can require naming the subcontractors or the low bidders going in under the general, if that's important to you. But, the most important thing to me, and I think to the public, is to have the most economical projects built today at the lowest possible cost, so it will enable you and your peers and my peers and your constituents to get as many projects under their belt and built in this fiscal year and in the fiscal years to come.

We open our arms and invite you and your friends and your knowledgeable constituents that are in this contracting firm to join our organizations. Make applications. We are in no way, shape or form standing here today, or ever will in the future, or have in the past, prohibited a minority from joining our organization.

I am just summing up. We have to, for the betterment of the public in general, ask you to defeat this motion on the floor tonight and to find some other way, so we don't hurt the total community by having projects go over budget. By not being able to do all you want to do for the public. This is not the answer. There must be another way. I will answer any questions you have.

MR. MARSH: Mr. Mayor?

[44] MAYOR WEST: Mr. Marsh.

MR. MARSH: Mr. Shuman, I appreciate your statement, and we're going to help you in your effort to get some black members. But, I still have to ask you the questions. In the Central Virginia chapter, about how many members are there, would you say?

MR. SHUMAN: In the—

MR. MARSH: Altogether.

MR. SHUMAN: In the Professional Estimators Association, here in the Richmond chapter, there is now 60 members. One is black.

MR. MARSH: One of out of sixteen?

MR. SHUMAN: One out of sixty.

MR. MARSH: Sixty. Okay. In the Central Virginia chapter, what's the total number of members?

MR. SHUMAN: I believe there's 45, and at this point, I don't know how many—I believe there's one minority.

MR. MARSH: Thank you, sir.

MR. SHUMAN: Mr. Marsh, may I ask you a question? How many black electrical firms are there in this City?

MR. MARSH: There will be more in the future than there are now.

MR. SHUMAN: We hope so, because we'd like to have them.

[45] MR. KENNEY: Mr. Mayor?

MR. MARSH: Mr. Kenney.

MR. KENNEY: Gentleman—I can't recall your name—do you reside within the boundaries of the City of Richmond?

MR. SHUMAN: I live in Henrico County right now. I'm moving back.

MAYOR WEST: Thank you so much. I know we have hashed this over quite a bit. We talked about the legality of the paper. But, I guess the thing that concerns me more than anything else that I've heard here tonight is insinuations that minority contractors inflate the bidding process, that their performances would be conducive to not first-class work. And I don't think that this paper is designed to perpetuate that kind of deficiency. I'm just speaking as one person.

I am more disturbed by that kind of attitude than I am about the legality of this paper. Sure, I want it legal. I want it morally right. But, I would say the attitudes of persons who have to participate in this process also have to be morally right. And, I've heard sprinkled throughout several presentations the idea that minority participation would result in inflation. It may, but that's not a unique situation. That minority participation would result possibly in work not being first class,

that's not unique to minorities. And I would say to all persons concerned [46] that maybe that's the purpose for this paper. That we have not had the kind of attitude in the market place that was needed.

Clerk, call for the question, please.

MR. MARSH: Just, there are some remarks I would like to make, Mr. Mayor, if you don't mind. I think all the reasons that we have heard tonight urging the defeat of this particular paper have been considered before and rejected by Courts, and I think those arguments are without merit. There is some information, however, that I want to make sure we put in the record. I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State, and around the nation. And I can say without equivocation, that the general conduct in the construction industry in this area, and the State and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread.

I think the situation involved in the City of Richmond is the same, and I would like to give the Clerk a copy of the listings of the contracts for the past five years awarded by the City of Richmond. Contracts totalling over 124 million dollars. And less than one percent were given—were awarded to minorities. I think the question of whether or not remedial action is required is not open to question.

I think this is a good paper. There's enough [47] flexibility to permit the paper to work, and I can appreciate all of the arguments made by those who have opposed this paper. But, I can say that they were made in other places and other times whenever papers like this have been proposed. They were made when the City adopted the requirement for the CDBG—the requirements, and our experience has shown in that area that our percentage has exceeded the numbers specified and the problems anticipated had not been realized. The disease is not as bad as the anticipation and the dread. And, I would

say that this paper is going to work. It is legal. Let's give it a chance.

MR. DEESE: Mr. Mayor?

MAYOR WEST: All right, Mr. Deese.

MR. DEESE: Mr. Mayor, Members of the City Council, I would concur with Mr. Marsh's statement in it's entirety. I spent my early years in government working for the City of Pittsburg, my home town, working for the Mayor's Office and the Human Relations Commission. And, racial discrimination in the area of contracting has not changed that terribly much since those days in the mid '60's. And I would dare say, Mr. Mayor, Members of Council, that the opportunities for minority contractors have not improved that greatly in the 18 years since I left the City of Pittsburg. And I would dare say that an improvement can be made here in this particular area.

[48] MAYOR WEST: Any further discussion?

MR. KEMP: Mr. Mayor?

MAYOR WEST: Mr. Kemp.

MR. KEMP: I didn't hear the same message from many of the speakers tonight that apparently came across in the minds of some of the other Members of Council. I felt that every presentation was fair, was aboveboard. It spoke to the point. It indicated that the minority contractors were just not available. There wasn't a one that gave any indication that a minority contractor would not have an opportunity, if he were available. I just—I hate to see this Body criticized—those people who came here in good faith tonight, to express hope that minority contractors would be available. Any time you put a limit or a mandate, it seems to me that all you're doing is exacerbating a bad situation. I would love to see more minority contractors here. But, those types of things just take time.

I think the legal points that were brought up, we've got all of the litigation that this Council can stomach, and I would hate to see us open a door to further litiga-

tion on a matter that has been expressed that they would love to have them. If this paper's voted on tonight, I'm going to have to vote in opposition to it.

MR. RICHARDSON: Mr. Mayor?

MAYOR WEST: Mr. Richardson.

[49] MR. RICHARDSON: Mr. Mayor, Members of Council, and to those individuals who came down to speak to this paper, I had hopes that the paper, itself, would not have evoked such conflict and disagreement on where we all want to go. It seems like everybody is so in love with each other and so hopeful and wanting everything to work together and want everybody to be a part of everything, idealistically. But, when it gets down to a practical matter of making it happen, there tends to be a lot of excuses.

Mr. Kemp, when you say these things take time, they can take as much time as we permit it to take. We can either let it happen over the next 200 years, or we can contribute to making it happen over the next two years, or three, or four.

I think the same types of things we heard tonight, particularly when we consider that list that was handed to Mr. Duffey on the contracts over the last five years, after talking with the City Attorney and discussing this matter, we found that .67 percent went to minorities. After realizing that and after realizing that many of the speakers who stood had an even lesser average of black participation, I am more convinced now than ever before that we need to contribute together in a good faith effort to make this happen, not let it happen over a long period of time. Because, some of the same things that were said tonight, in 1983, were [50] said in 1933, about police officers who would be black, about firemen who would be black, about teachers who would be black, about the system crumbling because all of a sudden, someone who was perceived as being lesser of a human being, will be put in a position of responsibility. And unless we're able—all of us, black and white—to be courageous enough to take that step and say we're going to make this happen,

then it won't happen. But, as long as we come up with these excuses that they're not out there, then they won't be out there. As long as we set back and say we can't do it, then we won't do it.

So, I think the Council ought to, all of us, ought to vote affirmatively, to get the ball rolling for all of our benefit. Not just a part of us, all of us. And I think it will work.

MAYOR WEST: Mr. Gillespie.

MR. GILLESPIE: Yes. I have a question for Mr. Deese. I wish we were in a work session, I think it would be more appropriate there, but this is the only chance I've got to ask it. I assume, because we have policies that are on the books now and because it is something this City wants to do—

MR. MARSH: Sorry to interrupt, but, Mr. Gillespie, your voice is tailoring down. I can't hear you, and I don't want to miss this.

MR. GILLESPIE: Pay strict attention. I know [51] that you will.

Apparently, you have not been able to find, at least locally or nearly locally, 30 percent contractors, minority. My question is, since, therefore, the contracts must be going to nonminority contractors, who are employing both blacks and whites, these people will now not be getting some 23 percent, 22 percent, whatever the number is, of the contracts that the City lets. So, therefore, my question is, have you assessed the impact that this is going to have on unemployment in our City, and particularly on unemployment among blacks, which is one of our most significant problems. My concern being, that if we have to go to great lengths and long distances to attract minority vendors, what's that going to do to our unemployment picture in the City of Richmond?

MR. DEESE: Mr. Gillespie, the law, as I understand it, reads specifically that if a contractor makes a good effort to attempt to find minorities and he is unsuccessful in that attempt, then he or she can apply for the—

he can apply for the appropriate waivers, and those waivers, if granted by the department, working its way eventually up to me, and if I concur in it, the contractor is waived from that responsibility. So, he has to make an effort to obtain minority contractors. If he is unable to do that and he has made the necessary efforts, contacting the necessary groups and organizations, then the matter is waived. And, we [52] do that frequently.

MR. GILLESPIE: So what's the impact, then, on unemployment in our City going to be?

MR. DEESE: I can't assess that. I don't have—

MR. GILLESPIE: Is there going to be an impact?

MR. DEESE: I don't know. The only thing that I can say is, there are firms that hire minorities as laborers or in some capacity, and they continue to do business in the area. I would assume that they will continue to hire minorities in some of the laboring positions they have in their organizations.

MR. GILLESPIE: Since you don't know, and since it is a problem in our City, is it worth assessing the impact before we act on the bill?

MR. DEESE: I don't think that's necessary.

MR. GILLESPIE: Okay.

MR. DEESE: My opinion.

MR. GILLESPIE: Mr. Mayor, I expressed my reservation about the legalities, privately and publicly. Several Members of the Council have said, you know, let it go, let's go to Court. Let's decide the question.

I'm tired of going to Court. And as much as I support this, you-all have put me in a position where you're going to make me vote no on something that I'm very much in support of. I was very much behind the Mayor's minority [53] business enterprise board. I want to support those people, all they do. I may want to support this bill if I can be comfortable, legally, with it. But, I am not now. And that's all I have to say.

MR. MARSH: Mr. Mayor?

MAYOR WEST: Mr. Marsh.

MR. MARSH: I just want to say, without naming anybody, that I hope when we vote on this bill, we are man enough, or woman enough, to vote on it and not try to find excuses as a reason why we're not going to vote for it. We ought to be big enough to stand up for our vote and not try to find excuses on a matter of this importance to the community.

MR. GILLESPIE: Mr. Marsh, I'm not looking for excuses—

(Inaudible discussion.)

MR. MARSH: Do I have the floor?

MAYOR WEST: Yes, Mr. Marsh, but I think you may be impugning another Councilmember's integrity—

MR. MARSH: I am not.

MAYOR WEST: —and I would rule you out of order.

MR. MARSH: I would like to complete my statement.

[54] MAYOR WEST: I would have to rule you out of order if you want to impugn someone's integrity.

MR. MARSH: I'm not impugning anyone's integrity.

MAYOR WEST: It is the Chair's position that if you continue with this line of statement, you are impugning, and you are out of order.

MR. MARSH: I would like to complete my statement, Mr. Mayor.

MAYOR WEST: All right.

MR. MARSH: I think this is an important policy matter for the City. And all of us are entitled to have our various reasons for taking the position that we take. And I think those of us should be willing to state those reasons, and I'm willing to state my reasons for supporting the paper. And I hope that anybody who would oppose the paper, would give his reasons, his real reasons, for opposing it.

MS. WAKE: Mr. Mayor?

MAYOR WEST: Ms. Wake.

MS. WAKE: Mr. Marsh, I assure you that as always, I'm going to give my real reasons. I oppose this

paper because it just strikes to me at the core of what this Country is all about.

Mr. Richardson, you don't make it happen. You get out there and you work your butt off, and it does happen. That's what this Country is all about.

[55] And I want to remind you that when you pass legislation like this, we could down the road experience something like what Miami is going through right now. And all of a sudden, they would be appearing down here, and your black contractors would be saying yes, but how about me? How about me? When they start saying, you've got to cut us in. That is an unofficial way of manipulating the free-enterprise system. And, it doesn't work. And, it isn't going to work.

Now, I think with the accusations that have been made here tonight and the questions that have repeatedly been asked of every speaker that we've had, that it would behoove you co-sponsors of this bill to have brought in—and I still want it brought in at some later date—a list of minority bonded—now, I'm talking about responsible minority contractors in this City. Because I know, myself, from experience—I inquired one time about a minority person that I thought wasn't getting any business in the City, and you-all said no way do you want us dealing with them.

So, you just make your choice among minority contractors. And you have acknowledged to me first hand that you recognize there was some responsible and some not responsible. But, I think if there are this great number out there, I want to see a list of them. Because I think then these gentlemen out here should have a copy, and they will know where to seek their membership.

[56] But, to just impugn them and say, you're exclusive, when I am a part of an organization that has been in a similar situation, and we are having the same problem. And to accuse people of being racially motivated

when they do not have black members I think is most unfair.

MR. KENNEY: Mr. Mayor?

MAYOR WEST: Mr. Kenney.

MR. KENNEY: When decisions are to be made in forums such as this, in which many individuals will make allegations which we've heard over the years, that minorities have some inferiors—and the inference has been made here this evening. Again, I want to remind all Members of the Council, and to the public in general, that we, as minorities, heard this in the '60's, we heard it in the '70's, and in 1983, we're hearing it still. And when the votes are taken on these kinds of issues, you really show your true colors.

MR. RICHARDSON: Mr. Mayor?

MAYOR WEST: Mr. Richardson.

MR. RICHARDSON: Trying to at least wrap this thing up on a high note, at least something positive to think about, certainly I'm sorry to see that we've turned it into something that appears to be so ugly, because I think Richmond has better than this. And I just want to tell the public that it's not really this bad. It's really not this bad. It's going to be much better. Because number one, I want you, [57] Mr. Deese, with Mr. Carter's assistance, to provide Ms. Wake with that State computerized list of bonded, qualified, quote, unquote, responsible businesses. And two, I want to remind you that the same thing was said in Atlanta when they built the largest airport in the world, and minority contractors finished it on time, in budget, and nobody is complaining now.

So, if you want to exercise that self-fulfilling prophesy of failure, then that's probably what would happen. But, if you want to look at it and say, we can do it, then that's what we will do. And I hope we approach it from that vantage point and not from a defeatest vantage point, for some unstated reason.

MS. WAKE: Mayor West?

MAYOR WEST: Ms. Wake.

MS. WAKE: I want to respond that you and Mr. Kenney, etc., have used the word inferior. I have not heard that word.

MR. RICHARDSON: I didn't say that.

MS. WAKE: You did. You just used it, because I wrote it right down when you used it. And you said inferior. What I hear is numbers. You did so. You come listen to the recording tomorrow. You said inferior, that we're saying inferior. And it is numbers that I'm hearing. It's not the inferior fact. It's the fact of where do we find the people to bid, because of the lack of numbers of these craftsmen. [58] And that's the point they are speaking to. And you're the one that brings in the other, that hasn't been mentioned.

MAYOR WEST: Call for the question, please.

MR. DUFFEY: Mr. Gillespie?

MR. GILLESPIE: I abstain.

MR. DUFFEY: Mr. Kemp?

MR. KEMP: No.

MR. DUFFEY: Mr. Kenney?

MR. KENNEY: Aye.

MR. DUFFEY: Mr. Leidinger?

MR. LEIDINGER: Aye.

MR. DUFFEY: Ms. McDaniel?

MS. McDANIEL: Aye.

MR. DUFFEY: Mr. Marsh?

MR. MARSH: Aye.

MR. DUFFEY: Mr. Richardson?

MR. RICHARDSON: Aye.

MR. DUFFEY: Ms. Wake?

MS. WAKE: No.

MR. DUFFEY: Mr. Mayor?

MAYOR WEST: Aye.

MR. DUFFEY: Aye's, 6; no's, 2; and one abstention.

(The hearing was concluded.)

[59] I, Marion L. Gerheart, do hereby certify that the foregoing is a true and accurate transcription of my shorthand notes taken from the electronically-produced proceedings.

Given under my hand this 30th day of January, 1984.

/s/ Marion L. Gerheart
MARION L. GERHEART
Notary Public
Commonwealth of Virginia at large

No. 87-998

Supreme Court, U.S.
FILED
APR 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,
Appellant,

v.

J.A. CROSON COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF APPELLANT CITY OF RICHMOND

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a city, in order to remedy the virtual absence of minority participation in its city construction contracts caused by racial discrimination in its construction industry, may enact an ordinance that requires prime construction contractors to subcontract a portion of their city contracts to minority businesses.

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IN THE

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OCTOBER TERM, 1987

No. 87-998

CITY OF RICHMOND,

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---

BRIEF OF APPELLANT CITY OF RICHMOND

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit from which this appeal is taken is reported at 822 F.2d 1355 (4th Cir. 1987). It is reproduced at page 1a in the appendices attached to the Jurisdictional Statement ("J.S. App. 1a"). The order of the court of appeals denying the Petition for Rehearing with Suggestion for Rehearing En Banc is unreported and is reproduced at page 27a of the appendices attached to the Jurisdictional Statement. An earlier opinion of the court of appeals, which was vacated by this Court, is reported at 779 F.2d 181 (4th Cir. 1985) and is reproduced at page one of the supplemental appendices to the Jurisdictional Statement ("J.S. Supp. App. 1"). The decision of this Court granting certiorari, vacating the earlier judg-

ment of the court of appeals and remanding to the court of appeals is reported at 106 S. Ct. 3327 (1986) and is reproduced at page 31a in the appendices attached to the Jurisdictional Statement. The opinion of the district court is unreported and is reproduced at page 112 of the supplemental appendices to the Jurisdictional Statement.

JURISDICTION

The decision of the court of appeals declaring the Richmond ordinance unconstitutional and remanding to the district court for determination of appropriate relief was issued on July 9, 1987. J.S. App. 1a. A petition for rehearing with suggestion for rehearing en banc, filed on July 23, was denied on September 18, 1987, by a vote of 6-5. *Id.* at 27a. A notice of appeal to this Court was filed with the court of appeals on November 18, 1987. *Id.* at 29a. This Court entered an order noting probable jurisdiction in this case on February 22, 1988.

On March 7, 1988, the Clerk of this Court granted appellant City of Richmond an extension of time for filing its brief until April 21, 1988, pursuant to Rule 29.4 of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(2) (1982).

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

This appeal involves (1) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides that no state shall "deny to any person within its jurisdiction the Equal Protection of the laws," and (2) Richmond's Minority Business Utilization Plan, codified at Richmond, Va., Code ch. 24.1, art. I(F) (Part B) ¶ 27.10-27.20, art. VIII-A (1983). This plan is reproduced at page 233 of the supplemental appendices to the Jurisdictional Statement.

STATEMENT OF THE CASE

This case will decide the constitutionality of an ordinance enacted by appellant City of Richmond to remedy the effects on its public works program of racial discrimination in its local construction industry. Before the enactment of the ordinance, the Minority Business Utilization Plan, minority-owned businesses had been receiving virtually none of Richmond's public construction contracts even though the population of Richmond was half minority. The ordinance requires recipients of city construction contracts to subcontract at least thirty percent of the dollar amount of their contracts to qualified minority-owned businesses.

Appellee J.A. Croson Co. ("Croson") is a non-minority contractor that was denied a city construction contract because it refused to comply with the ordinance's subcontracting requirement. The district court upheld the ordinance but the court of appeals reversed, finding the ordinance in violation of the Equal Protection Clause of the Fourteenth Amendment.

A. Enactment Of The Minority Business Utilization Ordinance

The Minority Business Utilization Plan was conceived and enacted as a remedy for racial discrimination in Richmond's construction industry that had all but excluded minority businesses from the City's public works program. Expressly designated "remedial," it promotes wider participation by minority businesses in the City's construction projects. J.S. Supp. App. 248.

Prior to the ordinance, Richmond had been awarding more than 99 percent of its construction business to white-owned firms. Data compiled by the City's Department of General Services in early 1983 indicated that in the five previous years, two-thirds of one percent—essentially none—of the City's $124 million in construction contracts had been awarded to minority-owned busi-

nesses.[1] At that time, Richmond's population was approximately half minority, primarily black.[2]

The City's elected leadership concluded that this deplorable situation was a direct result of racial discrimination in Richmond's construction industry. On April 11, 1983, the Richmond City Council held a public hearing and the merits of the proposed ordinance were vigorously debated.[3] In addition to information about the negligible minority participation in the City's public construction contracts, the City Council heard evidence that the major construction trade associations in the Richmond area contained virtually no black members. The Associated General Contractors of Virginia had 600 members, including more than 130 in Richmond, but no black members;[4] the American Subcontractors Association had 80 members in the Richmond area but no black members;[5] the Richmond chapter of the Professional Contractors Estimators Association had 60 members but only one black member;[6] the Central Virginia Electrical Contractors Association had 45 members but only one black member;[7] and the Virginia Chapter of the National Electrical Contractors

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[1] Joint Appendix ("J.A.") 41. The data indicated that 0.67 percent of the value of the City's construction contracts went to minority-owned firms. *See also* J.S. Supp. App. 115.

[2] J.A. 12, 29. The district court took judicial notice of the fact that most minorities in Richmond were black. J.S. Supp. App. 207.

[3] In its opinion below, the court of appeals stated that the debate occurred "at the very end of a five-hour council meeting." J.S. App. 6a. In fact, as appellee J.A. Croson Company stated in its brief to the court of appeals, the debate lasted approximately one hour and forty-five minutes. Brief of Appellant/Cross-Appellee at 23, *J.A. Croson Co. v. City of Richmond*, No. 85-1002 (L) No. 85-1041 (4th Cir. Mar. 18, 1985).

[4] J.A. 27-28.

[5] *Id.* at 36.

[6] *Id.* at 39.

[7] *Id.* at 40.

Association had 81 members but only two black members.[8]

Representatives of each of these trade organizations appeared at the public hearing and spoke against the proposed ordinance. They claimed, among other things, that there was an insufficient number of minority contractors in the Richmond area to make the law work, and that those available would be more expensive and less reliable.[9] Supporters of the ordinance replied that similar arguments had long been used to limit minority participation in other endeavors, and often had proven unjustified.[10] In Richmond's own recent experience such arguments had been made when the City began to administer federal Community Development Block Grants, which required minority participation in federally funded construction and other projects. Those arguments were proven unfounded.[11] One of the ordinance's sponsors also pointed out that the very purpose of the ordinance was to provide opportunities for minority businesses to gain experience and prove their capabilities.[12]

The existence of discrimination in Richmond's construction industry—the core of the problem being addressed—was discussed at the public hearing and not disputed. One council member, a former Richmond mayor, drew on his own long experience with the Richmond construction industry. He stated "without equivocation"

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[8] *Id.* at 34.

[9] *Id.* at 31-32 (statement of Mr. Beck); *id.* at 33-34 (statement of Mr. Singer); *id.* at 35-37 (statement of Mr. Murphy); *id.* at 38-39 (statement of Mr. Shuman).

[10] *Id.* at 37 (statement of Mr. Kenney); *id.* at 43-44, 48 (statement of Mr. Richardson).

[11] *Id.* at 41 (statement of Mr. Marsh). Mr. Marsh explained that the percentage of minority participation in Community Development Block Grants "exceeded the numbers specified and the problems anticipated had not been realized."

[12] *Id.* at 43-44 (statement of Mr. Richardson).

that the industry is one in which "race discrimination and exclusion on the basis of race is widespread." [13] Richmond's City Manager, who has oversight responsibility for city procurement matters, concurred in these remarks.[14] No one denied that discrimination in the industry was widespread,[15] although some of the trade association representatives denied that their particular organizations engaged in discrimination.[16]

The City Council also was aware that there has been pervasive racial discrimination in the nation's construction industry. In 1977, the United States Congress had enacted a federal set-aside plan for minority contractors based on findings that the nation's construction industry is "a business system which has traditionally excluded measurable minority participation," [17] and that industry discrimination had severely limited minority participation in public contracting at the federal, state and local level.[18] In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), this Court upheld the constitutionality of the federal set-aside plan, finding that Congress had "abundant evi-

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[13] *Id.* at 41 (statement of Mr. Marsh). Aside from his time in public office in Richmond, Councilman Marsh has been practicing law in Richmond since 1961.

[14] *Id.* at 42 (statement of Mr. Deese).

[15] J.S. Supp. App. 164-65.

[16] J.A. 20 (statement of Mr. Watts); *id.* at 39 (statement of Mr. Shuman).

[17] H.R. Rep. No. 1791, 94th Cong., 2d Sess. 182 (1977) (quoted in *Fullilove v. Klutznick*, 448 U.S. 448, 466 n.48 (1980) (plurality opinion); *id.* at 505 (Powell, J., concurring).

[18] Years earlier, the President of the United States had issued an executive order authorizing affirmative action policies in federal contract procurement as a means to remedy the effects of discrimination. Exec. Order No. 11,114, 3 C.F.R. 774 (1959-63). This program was continued with Exec. Order No. 11,246. *See* Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65) as amended by Exec. Order No. 12,086, 3 C.F.R. 230 (1979).

dence" of racial discrimination in the construction industry to support its remedial action. *Id.* at 477-78 (plurality opinion). The Richmond ordinance was drafted with the *Fullilove* decision, and the findings of discrimination discussed therein, in mind. J.A. 14-15, 24-25.

At the end of the public hearing, the City Council voted six to two, with one abstention, to enact into law the Minority Business Utilization Plan.[19]

B. The Ordinance's Provisions

The Minority Business Utilization Plan requires contractors to whom the City awards prime contracts to subcontract at least thirty percent of the dollar amount of the contracts to minority business enterprises (MBEs), unless the prime contractor is itself an MBE or the City waives the requirement. The ordinance is designed to expire on June 30, 1988.[20]

Because the ordinance does not set aside prime contracts for minority businesses, the competitiveness of the bidding process is preserved. Since a prime contractor normally must make subcontracting arrangements before it can calculate its bid, the ordinance contemplates that minority subcontractors will be participants in the competitive bidding process. Once the bids are opened, the apparent low bidder is given ten days to submit a satisfactory Minority Business Utilization Commitment Form, containing information about the MBE subcontractor or

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[19] Richmond, Va. Code ch. 24.1, art. I(F) (Part B) ¶ 27.10-27.20 (1983). The plan actually was enacted pursuant to two ordinances. *See* J.S. Supp. App. 233, 249.

[20] Of course, the expiration of the Minority Business Utilization Plan does not moot this case. There remains a live controversy between the parties over whether Richmond's refusal to award Croson a contract was unlawful and entitles Croson to damages. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8-9 (1978).

subcontractors, or to seek a waiver of the minority subcontracting requirement. J.S. Supp. App. 60-61, 69.[21]

The ordinance authorizes the Director of the Department of General Services to promulgate regulations "which . . . shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved." [22] According to these regulations, the thirty percent requirement will be waived or lowered in the following circumstance:

> To justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises (which can perform subcontracts or furnish supplies specified in the contract bid) are unavailable or are unwilling to participate in the contract to enable meeting the 30% MBE Goal.

Id. at 67-68. The denial of a waiver may be appealed under the City's normal appeals procedures for disappointed bidders. *Id.* at 192.

The ordinance defines a Minority Business Enterprise as a business at least fifty-one percent of which is owned and controlled by minority group members.[23] The ordi-

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[21] Since the time that Croson brought this lawsuit, that procedure has been changed. The new requirement is that a prime contractor must submit a Minority Business Utilization Form or a waiver request with its bid or the bid will be considered non-responsive.

[22] J.S. Supp. App. 247. The City Council contemplated that the regulations would be similar to the waiver provisions used in the City's administration of Community Development Block Grants. J.A. 12-13.

[23] J.S. Supp. App. 251. The requirement that the business be controlled as well as owned by minority group members was added by amendment to the plan in June 1983. *See id. at* 217-18. Minority group members are defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* at 252.

nance's regulations require a city administrative officer to verify that minority businesses seeking to participate in a city construction contract are in fact owned and controlled by minorities, so that "sham" MBEs cannot take advantage of the plan. *Id.* at 62. The regulations also list the names and phone numbers of five Richmond agencies that will assist contractors in locating qualified, bona fide minority businesses to participate in a construction contract. *Id.* at 67.

C. The Ordinance Applied To Croson

On September 6, 1983, Richmond invited bids for the installation of plumbing fixtures at the city jail. The bids were due by October 12. J.S. Supp. App. 120. Croson, a non-MBE mechanical, plumbing, and heating contractor based in Richmond, decided to bid on the project and determined that it could meet the City's minority subcontracting requirement by purchasing certain plumbing fixtures from an MBE. *Id.* at 121.

Croson's regional manager, Eugene Bonn, had brief telephone conversations with several MBE suppliers on September 30.[24] On October 12, the day the bids were due, he contacted a local MBE, Continental Metal Hose ("Continental").[25] Continental's president, Melvin Brown, told Bonn that he wished to participate in the project with Croson, but he could not state a firm price on such short notice because he could not get an immediate commitment from suppliers. *Id.* at 122-23. Croson then sub-

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[24] Evidence in the record indicates that Croson's efforts to make subcontracting arrangements with an MBE were less than diligent. Telephone records submitted to the district court indicated that the five conversations lasted a total of less than ten minutes. *See id.* at 8 n.4. According to testimony before the district court, two of these MBEs expressed interest in the project and requested bid specifications from Bonn, but never received them. Officers of a third testified that they never received Bonn's call. *Id.*

[25] Bonn claims to have telephoned Continental's president on September 30, but the president denies this. *Id.* at 121-22.

mitted a bid using a quote for the plumbing fixtures received from a non-minority firm. *Id.* at 124.

As it turned out, Croson was the only bidder and was awarded the contract subject to its commitment to subcontract with an MBE. Continental's Brown attended the bid opening on October 13 and at that meeting was encouraged by Croson to continue trying to obtain a quote from suppliers. *Id.* at 123-24. Croson nevertheless requested a waiver of the MBE requirement on October 19, indicating simply that Continental was "unqualified" and that other MBEs contacted were "non-responsive" or "unable to quote." Brown learned of the waiver request on October 27, at which point he contacted a city official and represented that Continental was available to provide the fixtures specified in the contract. *Id.* at 124-25.

The City denied Croson's request for a waiver by letter dated November 2, and gave Croson ten more days to comply with the subcontracting requirement. By that time, Continental was able to quote a firm price, but it was higher than Croson had hoped. Croson again requested a waiver, or, alternatively, an increase in the contract price. The City elected instead to rebid the project and invited Croson to submit another bid. Rather than submit a new bid, Croson brought this lawsuit. *Id.* at 126-29.

D. The Proceedings Below

In its complaint, Croson claimed that the Minority Business Utilization Plan violated the Equal Protection Clause of the Fourteenth Amendment and Virginia state law, and it sought an injunction, declaratory relief, and damages. After a bench trial, the district court held for Richmond on all counts.[26]

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[26] *Id.* at 112. Croson also raised federal statutory claims based on 42 U.S.C. §§ 1981 and 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. However, Croson agreed these claims had no basis in the absence of a valid equal protection claim, J.S. Supp. App. 222-23, and did not raise them on appeal.

After finding the Richmond ordinance permissible under Virginia law, the district court considered Croson's equal protection claim. J.S. Supp. App. 155. Since the appropriate constitutional standard for review of race-based remedial programs had been left unresolved by this Court in *Fullilove* and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the district court relied on a three-part test synthesized from those cases by the Eleventh Circuit:

> (1) that the governmental body have the authority to pass such legislation; (2) that adequate findings have been made to ensure that the governmental body is remedying the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another; (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination.[27]

The district court determined that the Richmond ordinance met all the requirements of this test, and thus comported with the decisions of this Court in *Fullilove* and *Bakke*.

The first element of the test was satisfied because Virginia law granted municipalities the authority to adopt such legislation. J.S. Supp. App. 162-63. The district court found the second element satisfied because the City Council had before it sufficient evidence to conclude that racial discrimination in the local construction industry had severely impaired minority participation in the industry and that minority participation in the City's own public works program was negligible as a result. It cited the "enormous disparities" between the percentage of city construction contracts awarded to minorities and the

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[27] J.S. Supp. App. 161-62 (quoting *South Florida Chapter of Associated Gen. Contractors of Am. v. Metropolitan Dade County*, 723 F.2d 846, 851-52 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984) (emphasis omitted)).

percentage of minorities in Richmond, the hearing testimony of trade association representatives indicating that there were few minority businesses in the local construction industry, and the unrefuted hearing testimony about discrimination in that industry. *Id.* at 164-65. It also stated that Congress had "already extensively documented the fact that low levels of minority business participation in the construction industry in general and government contracting in particular reflect continuing effects of past discrimination." *Id.* at 165.

In considering the third element of the test, concerning the means employed in the remedial ordinance, the district court relied on a five-factor inquiry derived from Justice Powell's *Fullilove* opinion: (1) the reasonableness of the percentage chosen; (2) the adequacy of the waiver provision; (3) the consideration of alternative remedies; (4) the duration of the remedy; and (5) the ordinance's effects on innocent third parties. The court did a careful analysis of each of these factors and concluded that the test was satisfied. *Id.* at 172-98. It also rejected the argument that the Richmond ordinance was "overinclusive." *Id.* at 198-209.

On appeal, the court of appeals affirmed the district court in all respects, with Judge Wilkinson dissenting. *Id.* at 1. It found that the district court was correct to review the Richmond ordinance under the equal protection standards established in *Fullilove*, and that the district court had appropriately applied those standards. *Id.* at 24-55.

Croson sought certiorari from this Court, which granted the writ, summarily vacated the judgment, and remanded the case for consideration in light of *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). On remand, and without briefing or argument on the impact of *Wygant*, the original panel of the court of appeals reversed itself and found the Richmond ordinance unconstitutional, Judge Wilkinson writing for a divided court over a dissent from Judge Sprouse. J.S. App. 1a.

As the court of appeals' majority interpreted *Wygant*, Richmond was required to demonstrate a "compelling" interest in its ordinance, and could do that only by showing that it "had a firm basis for believing [there was] prior discrimination by the locality itself." *Id.* at 9a. The majority considered the City's statistical evidence "spurious" and the City Council hearing testimony "nearly weightless." *Id.* at 8a. It concluded that the Richmond ordinance was predicated only on "the loosest sort of inferences" of past discrimination by the City, and therefore was unconstitutional. *Id.* The majority also held, in the alternative, that the ordinance was not sufficiently "narrowly tailored" to meet its remedial goal. *Id.* at 11a.

The dissent argued that the majority "misconstrues and misapplies *Wygant*." *Id.* at 14a. It stated that *Wygant* did not require evidence of discrimination in public procurement by the City itself, but that this requirement had been satisfied in any event. *Id.* at 18a. It noted the history of pervasive racial discrimination in the nation's construction industry, *id.* at 19a, and it found that the disparity between the percentage of Richmond's construction contracts awarded to minority businesses and the percentage of minorities in Richmond was so dramatic as to "break[] the bounds of the sometimes suspect 'science' of statistics." *Id.* at 21a.

The dissent concluded that the proof of governmental discrimination required by the majority "might be fatally counterproductive to the concept of affirmative action," *id.* at 20a, and in any event is inappropriate "in areas where discrimination had effectively prohibited the entry of minorities into the contracting business, as in Richmond." *Id.* n.11. It stated that the proof required by the majority "would ensure the continuation of a systemic *fait accompli*, perpetuating a qualified minority contractor pool that approximates two-thirds of one percent of the overall contractor pool." *Id.* at 20a. The dissent also found the

Richmond ordinance sufficiently narrowly tailored to pass constitutional muster.

Richmond filed a petition for rehearing and suggestion for rehearing en banc. The court of appeals denied the petition by a vote of six to five. *Id.* at 27a.

SUMMARY OF ARGUMENT

The central issue in this case is whether the court of appeals erred in holding Richmond's Minority Business Utilization Plan unconstitutional on the basis of language in the plurality opinion in *Wygant v. Jackson Board of Education*, which it construed to require a governmental entity to demonstrate its own discrimination in order to justify an affirmative action plan. To reach this conclusion, the court of appeals ignored relevant precedents of this Court, particularly *Fullilove v. Klutznick*, which presented facts and legal issues very close to those presented here.

Upon analysis, it is clear that *Wygant* does not control this case and that Richmond's remedial ordinance is entirely consistent with the relevant precedents of this Court. The ordinance represents a responsible legislative effort to remedy the effects on the City's public works program of longstanding, pervasive racial discrimination in the local construction industry. Richmond's ordinance is well designed to achieve its remedial purpose and has only minimal impact on non-minorities.

In the five years prior to the enactment of the Minority Business Utilization Plan in 1983, Richmond, which has a population that is half minority, awarded more than 99 percent of its $124 million in public construction contracts to white-owned businesses. There is no serious dispute that this fact reflects a local construction industry in which minority entry and advancement have been stymied by years of racial discrimination. The effects of this discrimination also are reflected in the virtual absence of black members in Richmond's major construction

trade associations. At the public hearing on the merits of the ordinance, the City Council heard knowledgeable and unrefuted testimony about this industry discrimination. The City Council was well aware that Richmond was part of a longstanding pattern of racial discrimination throughout the nation's construction industry.

Richmond had a compelling interest in remedying the effects of this identified local industry discrimination on its own public works program, much like the interest supporting the federal program in *Fullilove*. Like Congress, the City had been awarding its taxpayers' dollars to a pool of contractors from which minorities had been substantially excluded by unlawful racial discrimination, and thus it had become a passive participant in that discrimination. Like Congress, Richmond sought to put minority-owned construction firms on a more equitable footing with respect to public contracting opportunities. As this Court found in *Fullilove*, this was an entirely appropriate use of affirmative action. Richmond needed to take race into account because race-neutral remedies would not overcome the disabling effects of past discrimination.

Richmond's interest in its ordinance was especially compelling since if Richmond had not acted, there would have been no remedy. Though part of a national pattern, the effects of local construction industry discrimination on Richmond's own public works program was Richmond's problem, peculiarly within the competence of Richmond's legislative body. It would distort principles of federalism to deny Richmond the means effectively to address this problem, while permitting the federal government to take similar remedial action under similar circumstances.

The court of appeals below nevertheless held Richmond's ordinance unconstitutional because it was not predicated on Richmond's own discrimination against

minority contractors. This requirement was based entirely on language in the plurality opinion in *Wygant*. Not only did this language not receive the support of a majority of this Court, but even the plurality did not decide that a government always must demonstrate its own discrimination in order to enact an affirmative action plan. Governmental discrimination was not a decisive issue in *Wygant*, both because the evidence in the record was not probative of any sort of discrimination, and because layoffs were determined to be an inappropriate means to achieve even a compelling purpose. *Wygant* does not control the result here.

The court of appeals' "governmental discrimination" requirement is wholly inappropriate because pervasive, unlawful industry discrimination, and its profound effect on Richmond's public works program, provided an adequate basis for remedial action. Requiring evidence of governmental discrimination under these circumstances is unnecessary and beside the point. Moreover, because proof of governmental discrimination is elusive where industry discrimination has largely prevented minority businesses from even competing for city construction contracts, this requirement would preclude any remedy for this most effective and pernicious discrimination.

Finally, the minority business utilization ordinance is carefully designed to meet its remedial goal with minimal impact on non-minorities. By teaming up minority subcontractors with more established, white-owned firms, the ordinance removes obstacles that have kept minority businesses out of public contracting and provides them with valuable experience, credibility, and an opportunity to develop business relationships with more established firms. The ordinance's impact on non-minorities is slight since no prime contracts are set aside for minorities, the subcontracting requirement does not unsettle any vested right or expectation, and thirty percent of city construc-

tion contracts represents only a tiny fraction of all construction contracting opportunities in Richmond. In addition, the ordinance is temporary, contains a reasonable waiver provision, and is designed to root out "sham" minority businesses.

ARGUMENT

Racial inequality remains a scourge of our society. Cities, states, and the federal government each have a crucial role to play in the effort to rid our country of racial discrimination and its continuing effects.

Richmond, like other cities, has accepted that responsibility. In 1983, in response to clear evidence that racial discrimination in its local construction industry had resulted in a nearly all-white industry, and consequently a distribution of public construction contracts only to businesses owned by whites, Richmond enacted the Minority Business Utilization Plan. This ordinance requires contractors to whom the City awarded prime contracts to subcontract at least thirty percent of the dollar amount of their city contracts to minority businesses.

This case tests whether the Constitution forbids Richmond from enacting this remedial legislation. More particularly, it tests whether the court of appeals was correct in relying on language in *Wygant* to the exclusion of a line of more relevant precedents of this Court, especially *Fullilove*. When the Richmond ordinance is analyzed in light of its purpose and those precedents, it is clear that it is constitutional and that the court of appeals' reliance on *Wygant* was misplaced.

The level of constitutional scrutiny to be applied to remedial legislation like the Richmond ordinance has not been determined by this Court.[28] Appellant submits that

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[28] "[A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is

an intermediate level of scrutiny, as endorsed by several members of this Court, is the appropriate standard to be applied in this case because racial classifications are not inherently suspect where they are used as part of a remedy for the effects of identified racial discrimination.[29]

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made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis." *United States v. Paradise*, 107 S. Ct. 1053, 1064 (1987) (plurality opinion). *See also id.* n.17; *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3052-53 (1986) (plurality opinion) ("We have not agreed . . . on the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures").

[29] "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice. . . ." *Bakke*, 438 U.S. at 325 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). *See also Wygant*, 476 U.S. at 296 (Marshall, J., dissenting); *id.* at 313 (Stevens, J., dissenting); *Fullilove*, 448 U.S. at 507 (Powell, J., concurring); *id.* at 519 (Marshall, J., concurring in the judgment); *id.* at 550-554 (Stevens, J., dissenting); *Bakke*, 438 U.S. at 305 (opinion of Powell, J.); *id.* at 359 (Brennan, White, Marshall, and Blackmun JJ., concurring in the judgment in part and dissenting in part).

The Equal Protection Clause of the Fourteenth Amendment does not require strict scrutiny of affirmative action measures. Its core purpose is not to prohibit the use of racial classifications *per se*, but to prohibit their use to subjugate or disadvantage on the basis of race. *See Brown v. Board of Education*, 347 U.S. 483, 493-94 (1954) (racial segregation in public schools violates the Equal Protection Clause because it "generates a feeling of inferiority" in the hearts and minds of black children). *See also* J. Ely, *Democracy and Distrust* 135-36, 152-53 (1980); L. Tribe, *American Constitutional Law* 1514-21 (2d ed. 1988). Whites as a racial group historically have not been subjugated or disadvantaged by non-whites, and affirmative action does not have such a purpose or effect. Where, as here, it appears that racial classifications are being used to remedy past discrimination against non-whites, an intermediate level of judicial scrutiny is sufficient to ensure that they are not actually serving some improper purpose and that the effect that they have on whites is not unreasonably burdensome.

Even under strict scrutiny, however, the Minority Business Utilization Plan passes constitutional muster.

Whatever the level of scrutiny, the constitutional inquiry has two prongs: 1) whether the affirmative action plan serves interests sufficiently "important" or "compelling" to justify the use of racial classifications; and 2) whether the plan is adequately tailored to serve its purpose without unnecessarily harming the interests of non-minorities.[30] Richmond's minority business utilization ordinance satisfies both of these requirements. It is legislation designed to remedy the effects of identified racial discrimination in Richmond's construction industry that substantially had foreclosed minority access to contracting opportunities with the City, and it is a temporary, flexible plan that imposes little burden on non-minorities.

I. RICHMOND HAS A COMPELLING INTEREST IN REMEDYING THE EFFECTS ON ITS PUBLIC WORKS PROGRAM OF RACIAL DISCRIMINATION IN THE LOCAL CONSTRUCTION INDUSTRY

State and local governments unquestionably have "a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." [31] Richmond's City Council adopted its Minority Business Utilization Plan because racial discrimination in Richmond's construction industry long had impaired minority entry and advancement in the industry, and, as a consequence, minority businesses were receiving virtually none of the City's public construction contracts. This factual predicate was found by the district court to be amply supported and has not seriously been contested.

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[30] *See Paradise*, 107 S. Ct. at 1064 & n.17 (plurality opinion); *Sheet Metal Workers*, 106 S. Ct. at 3052-53 (plurality opinion).

[31] *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

Whether this predicate of discrimination justifies Richmond's ordinance is the critical issue in this case. The court of appeals held that the only predicate that would justify the ordinance is the City's own discrimination. Richmond submits that it has a compelling interest in remedying the effects of identified construction industry discrimination on its public works program regardless of whether the City itself has discriminated. Richmond's remedial action represents a considered decision by Richmond's elected legislative body, which is fully aware of its responsibilities to all the people of Richmond, and constitutes an appropriate use of affirmative action.

A. Racial Discrimination In The Local Construction Industry Had Substantially Foreclosed Minority Access To City Contracting Opportunities

In 1983, one-half of the population of Richmond was minority, primarily black. In the five years prior to 1983, two-thirds of one percent—practically none—of the City's $124 million in construction contracts was awarded to minority-owned businesses. As both the City Council and the district court concluded, this disturbing fact was a direct consequence of pervasive racial discrimination in Richmond's local construction industry that had impaired minority entry and advancement and had substantially foreclosed minority opportunities to compete for city construction contracts.

This conclusion has abundant support in the facts of this case. The disparity between the percentage of city contracts awarded to minority businesses and the percentage of minorities in Richmond—less than one percent versus fifty percent—is so enormous that by itself it creates a strong inference of discrimination. In a city that is half minority and that awards $124 million in city construction contracts over a five-year period, one would expect

minority businesses to be awarded much more than two-thirds of one percent of those contracts, absent discrimination.[32] Because the number of minority contractors in Richmond was "quite small," J.S. App. 7a, this discrimination must have been in the industry itself.

When this evidence is combined with other facts, the inference of discrimination becomes so powerful that "innocent" explanations of the meager minority participation in Richmond's city construction contracts seem farfetched at best.[33] As the City Council learned, and as the following chart demonstrates, in 1983 there were literally no black members in one of Richmond's principal construction trade associations, the Associated General Contractors, and virtually no black members in other major construction trade associations in the Richmond area:

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[32] *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40 & n.20 (1977) (statistics showing racial imbalance between work force and general population may reflect discrimination).

[33] The probativeness of the statistical evidence here is illustrated by comparison to the statistical evidence of discrimination in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). In enacting the minority set-aside provision of the Public Works Employment Act of 1977, Congress also relied on a disparity between the percentage of federal contracts awarded to minority businesses and the percentage of minorities in the general population. *Id.* at 459 (plurality opinion). The level of minority participation in federal contracts was also less than one percent, but minorities comprised only 15-18 percent of the nation's population, compared to 50 percent in Richmond. Chief Justice Burger nevertheless cited this disparity as a key piece of evidence in upholding Congress' findings on the effects of racial discrimination in the nation's construction industry. *Id.* at 478 (plurality opinion).

BLACK MEMBERSHIP IN RICHMOND'S MAJOR CONSTRUCTION TRADE ASSOCIATIONS IN 1983 [34]

Organization	Total Membership	Black Membership
Associated General Contractors (Virginia)	600	0
Associated General Contractors (Richmond)	130	0
American Subcontractors Association (Richmond)	80	0
Professional Contractors Estimators Association (Richmond)	60	1
Central Virginia Electrical Contractors Association	45	1
National Electrical Contractors Association (Virginia)	81	2

Like the negligible minority participation in the City's construction contracts, the near absence of minority members in these trade organizations is a manifestation of pervasive racial discrimination in Richmond's local con-

[34] This chart lists those trade associations whose representatives testified at the City Council hearing on the Minority Business Utilization Plan and provided information on black membership. J.A. 27-28, 34, 36, 39-40. The Richmond Builders Exchange, the Richmond Plumbing, Heating and Cooling Contractors Association and Richmond Area Municipal Contractors Association also were represented at the hearing but provided no information on black membership.

struction industry. Moreover, because membership in these organizations represents a significant economic opportunity,[35] these figures dramatically underscore the continuing effects of that discrimination.

At the City Council hearing, there was knowledgeable testimony, including the testimony of a former Richmond mayor, that discrimination in Richmond's construction industry in fact was widespread.[36] Moreover, while the merits of the ordinance were vigorously debated, no one denied that pervasive discrimination had occurred. It simply was beyond dispute that discrimination had denied minorities significant participation in the local construction industry, and therefore in Richmond's public construction contracts as well.[37]

Richmond's experience is not unique. There is a long, well-documented history of racial discrimination throughout the nation's construction industry. Black workers for years have been excluded from the skilled construction trade unions and training programs and hired only for relatively unskilled positions.[38] Whites have dominated

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[35] For example, members of the Associated General Contractors of America ("AGC") perform almost 80 percent of all commercial construction work in this country, according to a brief filed by the AGC in the court of appeals below. *See* Motion of the Associated General Contractors of America, Inc. for Leave to File as an *Amicus Curiae* in Support of the Appellant/Cross-appellee at 3, *J.A. Croson Co. v. City of Richmond*, Nos. 85-1002, 85-1041 (4th Cir. Mar. 18, 1985). The AGC also points out that construction is one of the largest industries in the United States, representing approximately eight percent of the nation's gross national product. *Id.*

[36] *See supra* p. 5-6.

[37] The record in this case contains no finding on the precise number of contractors in Richmond who were minority in 1983, though there has been no dispute that the number is "quite small." J.S. App. 7a.

[38] As this Court noted in a similar context, "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make

the skilled construction trades, and blacks have been prevented from following the traditional path from laborer to entrepreneur.[39] Consequently, most construction businesses are owned and managed by whites, as in Richmond.[40] Those few minority-owned construction businesses that have been formed have faced formidable ob-

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such exclusion a proper subject for judicial notice." *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 198 n.1 (1979).

This exclusion of black workers from skilled construction crafts began over a hundred years ago. At the time of the Civil War, black workers constituted the majority of the skilled workers, including construction workers, in the South. H. Hill, *Black Labor and the American Legal System: Race, Work and the Law* 9-11 (1985); S. Spero & A. Harris, *The Black Worker: The Negro and the Labor Movement* 16 (1931); G. Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 1079-1124 (1962); R. Weaver, *Negro Labor: A National Problem* 4-5 (1946); R. Rowan & L. Rubin, *Opening the Skilled Construction Trades to Blacks: A Study of the Washington and Indianapolis Plans for Minority Employment* 10-15 (1972). After the Civil War, and particularly after Reconstruction, black workers were systematically evicted from their craft positions in favor of white workers and barriers were erected to prevent black workers from entering those crafts in the future. Hill, *supra* at 12-34, 235-47; Myrdal, *supra* at 228-29. Construction historically is an industry from which blacks have been excluded by law and by the dominance of racially restrictive unions. M. Karson & R. Radosh, "The AFL and the Negro Worker, 1894-1949," in *The Negro and the American Labor Movement* 157-58 (J. Jacobson ed. 1968); Marshall, "The Negro in Southern Unions," in *The Negro and the American Labor Movement* 145 (J. Jacobson ed. 1968).

[39] *Fullilove*, 448 U.S. at 511-12 (Powell, J., concurring); *Rhode Island Chapter, Associated Gen. Contractors of Am. v. Kreps*, 450 F. Supp. 338, 356 (D.R.I. 1978); Days, *Fullilove*, 96 Yale L.J. 453, 477 (1987).

[40] J.S. App. 7a. According to testimony at the City Council hearing by a representative of the American Subcontractors Association, the latest Bureau of Census figures indicated that 4.7 percent of construction firms in this country are minority-owned, and 41 percent of these are concentrated in California, Illinois, New York, Florida and Hawaii. J.A. 35.

stacles, rooted in discrimination, that have impaired their ability to compete.[41] As one report of the United States House of Representatives stated, "The very basic problem . . . is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation."[42] This discrimination has as an inevitable corollary minimal participation by minority-owned businesses in public construction contracting opportunities.

This history of racial discrimination in the construction industry and its effects on public contracting are significant here because Richmond obviously has been part of this national pattern. The drafters of Richmond's Minority Business Utilization Plan in fact consulted this Court's decision in *Fullilove*, which discussed findings by the United States Congress that the effects of industry discrimination have not been confined to federal contracting. J.S. Supp. App. 165. The *Fullilove* plurality stated: "[T]here was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well."[43] The congressional findings further support

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[41] In *Fullilove*, this Court explained some of the barriers that minority businesses have faced in gaining access to government contracting opportunities at the federal, state and local levels:

> Among the major difficulties confronting minority businesses were deficiencies in working capital, inability to meet bonding requirements, disability caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses.

448 U.S. at 467 (plurality opinion).

[42] H.R. Rep. No. 1791, 94th Cong., 2d Sess. 182 (1977) (quoted in *Fullilove*, 448 U.S. at 466 n.48 (plurality opinion) and at 505 (Powell, J., concurring)).

[43] 448 U.S. at 478 (plurality opinion). This Court has held that a city's "substantial governmental interest" in regulating the time,

the conclusion that the enormous racial disparity in the awarding of city construction contracts was a consequence of racial discrimination in Richmond's local construction industry.[44]

The Richmond City Council, based upon the evidence of discrimination outlined above and also upon its own familiarity with the economic and social history of Richmond in general and the local construction industry in particular,[45] had abundant reason to conclude that racial discrimination was responsible for the problem that it faced. Its conclusion that discrimination had occurred is unassailable. Richmond's local construction industry

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place, or manner of protected speech may be established by findings and studies generated by other cities, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). It follows that Richmond should be able to rely on findings relevant to its problem made by the United States Congress and found by this Court to be supported by direct evidence.

[44] The facts supporting the Richmond ordinance are thus fundamentally different from the statistical evidence found insufficient to support the remedial plan in *Wygant*. In *Wygant*, the statistical evidence was not probative of discrimination. *See infra* p. 39. Here the extraordinary size of the disparity combines with other facts to compel the conclusion that discrimination had occurred.

[45] "No race-conscious provision that purports to serve a remedial purpose can be fairly assessed in a vacuum." *Wygant*, 476 U.S. at 296 (Marshall, J., dissenting). As this Court well knows, Richmond had confronted in its recent past the need to break down racial barriers in various other segments of its society and in the city government itself. *See, e.g., City of Richmond v. United States*, 422 U.S. 358 (1975) (concerning the City's annexation plan and its compliance with the Voting Rights Act); *Bradley v. School Board*, 462 F.2d 1058, 1065 (4th Cir. 1972) (en banc) (school desegregation case, finding that "within the City of Richmond there has been state . . . . action tending to perpetuate apartheid of the races . . ."), *aff'd by an equally divided Court*, 412 U.S. 92 (1973) (per curiam).

clearly has been "a business system which has traditionally excluded measurable minority participation." [46]

Once Richmond established a basis for its remedial action, the ultimate burden of proving the plan invalid was on Croson. *Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442, 1449 (1987); *Wygant*, 476 U.S. at 277-78 (plurality opinion). Croson did not meet this burden. It could do nothing to rebut the compelling inference that racial discrimination was responsible for the "glaring absence" of construction contracts awarded to minority contractors. *International Brotherhood of Teamsters*, 431 U.S. at 342, n.23 ("[F]ine tuning of the statistics could not have obscured the glaring absence of minority line drivers . . . . [T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero' ") (*quoted in Johnson*, 107 S. Ct. at 1465 (O'Connor, J., concurring in the judgment)). No other explanation even would have been plausible.

The district court heard all the facts and agreed that they supported an inference of discrimination. In a thorough opinion, it explicitly found "ample evidence" to conclude that the minimal minority participation in Richmond construction contracting reflected pervasive racial discrimination in the local construction industry.[47] The

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[46] *Fullilove*, 448 U.S. at 466 n.48 (quoting H.R. Rep. No. 1791, 94th Cong., 2d Sess. 182 (1977)).

[47] J.S. Supp. App. 165-66, 172. A factual predicate for an affirmative action plan properly is established when, after the plan is challenged in court, the trial court finds "a strong basis in evidence" for the remedial action. *Wygant*, 476 U.S. at 277 (plurality opinion); *see also id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment) (contemporaneous finding not required as long as there is "firm basis for believing that remedial action is required"). Because the district court below properly applied the "strong basis in evidence" test, its finding is entitled to deference. *Cf. American Textile Mfr's Inst. v. Donovan*, 452 U.S. 490, 529-30 (1981) ("Whether or not in the first instance we would find the Secretary's conclusions supported by substantial

court of appeals did not question the conclusion that discrimination had occurred, holding instead that the Richmond plan was unconstitutional because there was no finding of discrimination by Richmond itself. J.S. App. at 9a. Because the factual predicate for the Richmond ordinance has more than adequate support in the record of this case, the district court's findings should not be disturbed on this appeal.

B. Like Congress, Richmond Had A Compelling Interest In Remedying The Effects Of Identified Discrimination On Its Own Public Works Program

The Minority Business Utilization Plan was enacted after the City found itself doing business only with construction firms owned by whites, as a consequence of pervasive racial discrimination in Richmond's local construction industry. The City had a compelling interest in ending this appalling state of affairs and creating opportunities in its own public works program that had been unavailable to minorities due to that racial discrimination.

State and local governments[48] unquestionably have a compelling interest in remedying the effects of discrimination and providing equal protection of the laws in their

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evidence, we cannot say that the court of appeals in this case 'misapprehended or grossly misapplied' the substantial evidence test").

[48] A local government derives its powers from the state. The manner in which a state chooses to delegate its powers to its political subdivisions is a question of state law. *Bakke*, 438 U.S. at 366 n.42 (opinion of Brennan, J., White, J., Marshall, J. and Blackmun, J., concurring in the judgment in part and dissenting in part); *South Florida Chapter of the Associated Gen. Contractors of Am. v. Metropolitan Dade County*, 723 F.2d at 852; *Schmidt v. Oakland Unified School Dist.*, 662 F.2d 550, 558 (9th Cir. 1981), *vacated on other grounds*, 457 U.S. 594 (1982). The district court found that the City Council had the authority under state law to enact the Minority Business Utilization Plan. J.S. Supp. App. 141-154. The court of appeals did not disturb this finding.

jurisdictions.[49] This Court has held that this compelling governmental interest extends to ensuring that publicly available commercial opportunities are not denied to segments of the population on the basis of race, gender, or ethnic origin. *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984).[50] In so holding, the Court stressed "the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups . . . ." *Id.* at 626.

This case does not test the boundaries of this governmental interest, for at the very least a municipal government has a compelling interest in eradicating the effects of discrimination and ensuring equal opportunity in its own public works program. This interest is equivalent to

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[49] For example, in *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945), this Court held that the states constitutionally could enact legislation prohibiting discrimination by labor organizations.

[50] In *Roberts*, this Court unanimously held that the Minnesota Human Rights Act, which prohibits discrimination in places of public accommodation, constitutionally could be applied to forbid the Jaycees from excluding women from full membership. The Court stressed that the exclusion of women from the Jaycees deprived them of business contacts, employment promotions and other commercial advantages that were publicly available to men. 468 U.S. at 626. The Court concluded that the state's interest in breaking down traditional barriers to opportunity was so compelling that it justified some infringement on the Jaycee male members' first amendment rights of free association. *Id.* at 623-626. Justice O'Connor, concurring, did not find an infringement of any rights of association, but agreed with the Court that a compelling governmental interest was involved. She stressed the importance of "the power of States to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society." *Id.* at 632 (O'Connor, J., concurring in part and concurring in the judgment). *See also Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 107 S. Ct. 1940 (1987).

that which survived "a most searching examination" by this Court in *Fullilove*.[51] Like Congress, Richmond determined that minority businesses were receiving practically none of its public construction contracting funds as a result of racial discrimination in the construction industry. Like Congress, Richmond "has not sought to give select minority groups a preferred standing in the construction industry, but has embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities." 448 U.S. at 485-86 (plurality opinion). Ensuring nondiscriminatory access to government contracting opportunities is, this Court has stated, "one aspect of the equal protection of the laws." *Id.* at 478 (plurality opinion).

Like Congress, the City needed to take race into account in fashioning its remedy.[52] Simply prohibiting discrimination by its public contractors would have served little purpose, since the discrimination was already unlawful.[53]

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[51] 448 U.S. at 491 (plurality opinion). *See also id.* at 496 (Powell, J., concurring) (upholding the federal program "under the most stringent level of review").

[52] A local government's action is not unconstitutional merely because it has some negative impact on individuals' constitutional rights. *See, e.g., Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (a city's interest in advancing esthetic values is sufficiently compelling to justify some curtailment of speech protected by the first amendment).

[53] Exclusion from a construction trade union on racial grounds constitutes a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982). *See United Steelworkers of America v. Weber*, 443 U.S. 193, 198 n.1 (1979) (judicial findings under Title VII of "exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice"). Other forms of employment discrimination in the construction industry also violate Title VII, and employment discrimination by a recipient

Moreover, prohibiting future discrimination does nothing to remedy the disabling effects of past discrimination. In Richmond, years of purposeful racial discrimination in the local construction industry had left white contractors with overwhelming advantages in the competition for public construction contracts and the industry generally. The negligible participation of minorities in the City's construction contracts certainly gave no indication that this state of affairs was going to change by itself any time soon. Like Congress, the City determined that affirmative action was necessary to create opportunities for minority businesses in public contracting and help them become more competitive. Otherwise, the City faced the likely prospect of continuing indefinitely to distribute its taxpayers' dollars to a pool of construction contractors from which minorities had been effectively excluded.

The importance to Richmond of ensuring that government contracts are awarded without the taint of racial discrimination cannot be overstated. Like discrimination by the government itself, discrimination that forecloses access to government benefits "creates mistrust, alienation, and all too often hostility toward the entire process of government." [54] The City, by continuing to award construction contracts to a pool of contractors from which minorities had been practically excluded, in effect had become a passive participant in a system based on discrimination, and was helping to perpetuate that system. There was great potential for mistrust of and hostility toward the city government under these circumstances,

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of a Virginia public contract violates Virginia law as well. Va. Code Ann. § 11-44 (Repl. 1985). In addition, a white-owned construction firm's refusal on racial grounds to do business with a minority-owned firm violates 42 U.S.C. § 1981 (1982), which prohibits discrimination in contracting. *See Runyon v. McCrary*, 427 U.S. 160 (1976).

[54] *Wygant*, 476 at 290 (O'Connor, J., concurring) (quoting from S. Rep. No. 415, 92d Cong., 1st Sess. 10 (1971)).

and Richmond's interest in taking remedial action was substantial.

Furthermore, had Richmond not acted to remedy the problem, there would have been no remedy. Though part of a national pattern, the negligible minority participation in Richmond's public works program was Richmond's problem, to be addressed by Richmond. No other governmental entity has the same interest in this problem, and certainly no other governmental entity has the same competence to recognize the problem and fashion an appropriate remedy. No other governmental program in fact addresses the problem. It would be a perversion of federalism to hold that the federal government has a compelling interest in remedying the effects of racial discrimination on its own public works program, but a city government does not.[55]

Finally, there should be no question that the Richmond City Council was an appropriate governmental unit to take action in furtherance of the City's remedial interest. As the City's legislative body accountable to the Richmond public, the City Council was competent to identify the existence of discrimination in Richmond's construction industry and its effects on the City's own public works

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[55] The United States Commission on Civil Rights has urged that "States *and their subdivisions* must, at a minimum, enact laws which provide for their citizens the same level of protection offered by Federal statutes, executive orders, court decisions, and executive policy pronouncements." IV United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort—1974, at 129 n.32 (1975) (emphasis added) (quoting United States Commission on Civil Rights, "Revenue Sharing Program—Minimum Civil Rights Requirements" (1971)). And the Report of the National Advisory Commission on Civil Disorders (1968) (the "Kerner Commission"), established to study the causes and solutions to the urban riots of 1967, was emphatic that "[b]ecause the city is the focus of racial disorder, the immediate responsibility rests on community leaders and local institutions." Report of the Kerner Commission at 229.

program, and to determine that the City should enact appropriate remedial legislation.

C. Richmond's Remedial Action Is Justified Without Evidence Of Its Own Discrimination

The court of appeals below held Richmond's Minority Business Utilization Plan unconstitutional because it was not predicated on "prior discrimination by the locality itself." J.S. App. 9a. This requirement was unwarranted because pervasive local industry discrimination had prevented minority businesses even from competing for city contracts, and thus provided an adequate predicate for the remedial ordinance. Requiring evidence of the City's own discrimination in these circumstances would only permit this pernicious industry discrimination, and its effects on public contracting, to go unremedied. The court of appeals' requirement is incompatible with the precedents of this Court.[56]

The decision below rested on the premise that remedying a government's own discrimination is the only governmental interest that will support affirmative action policies. This case shows that this premise is untenable. As explained above, Richmond has a compelling interest in its remedial plan because of the profound effects of identified, pervasive, unlawful discrimination on its public works program. This interest is compelling regardless of whether the City itself discriminated against minorities in construction procurement.

Focusing on whether the City itself discriminated misses the point. Because racial discrimination in the local construction industry had substantially foreclosed minority access to city contracting opportunities, it had the same effect as discrimination by Richmond itself. In either case, the end result is the same—negligible minor-

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[56] The court of appeals derived the requirement from language in the plurality opinion in *Wygant*. As explained in part D below, *Wygant* does not control this case. *See infra* p. 38-41.

ity participation in the City's public construction contracts.[57]

The court of appeals' approach is unsound and leads to an anomalous result. It held that the City should have compared "the number of minority contracts and the number of minority *contractors*, taking into account other relevant variables such as experience and specialties." J.S. App. 7a (emphasis in original). This comparison never will be probative of governmental discrimination where, as here, industry discrimination has prevented minority contractors from even competing for city contracts.[58] The court of appeals' approach would permit

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[57] *See*, Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv. L. Rev. 78 (1986) (arguing that affirmative action plans may serve a variety of important goals other than remedying the past discrimination of the entity adopting the plan).

[58] As the district court found, the low number of minority contractors indicates "that past discrimination has stymied minority entry into the construction industry in general, as well as participation in government contracting in particular." J.S. Supp. App. 167.

In this sense, this case is like *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979). In *Weber*, this Court held that a private employer's affirmative plan was justified by a showing of a "conspicuous . . . imbalance in traditionally segregated job categories," 443 U.S. at 209, rather than a disparity between the percentage of black skilled craft workers hired and the percentage in the area labor market. In discussing this aspect of *Weber*, the Court in *Johnson* stated:

> Such an approach reflected a recognition that the proportion of black craft workers in the local labor force was likely as miniscule as the proportion in Kaiser's work force. The Court realized that the lack of imbalance between these figures would mean that employers in precisely those industries in which discrimination has been most effective would be precluded from adopting training programs to increase the percentage of qualified minorities.

107 S. Ct. at 1453 n.10. *Cf. Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (in establishing a prima facie case of employment dis-

this pervasive, unlawful industry discrimination to go unremedied. It would virtually guarantee the perpetuation of the status quo.[59]

Nothing in this Court's decisions requires evidence of Richmond's own discrimination. In *Fullilove*, there was no evidence that the federal government itself had engaged in racial discrimination in its disbursement of federal contracting funds. 448 U.S. at 527 (Stewart, J., dissenting). This Court's judgment did not depend on evidence of governmental discrimination of any type. The Court upheld the federal plan as a remedy for the effects of discrimination in limiting public contracting opportunities for minorities; though some of that discrimination was committed by state actors, nothing in either plurality opinion suggests that this was essential to the result.[60]

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crimination, plaintiff could rely on statistics concerning general population rather than applicant pool, where discriminatory practices may have discouraged persons from even entering applicant pool).

[59] In its affirmative action program for construction contractors, the federal government relies on general population statistics for precisely this reason. The Department of Labor concluded that it would not consider particular trades or crafts as the relevant labor pool, since minorities had been excluded from those trades and crafts by discrimination. *See* 41 C.F.R. § 60-4 (1987); Notice, 45 Fed. Reg. 65983 (1980).

[60] For Justice Powell, the result in *Fullilove* clearly turned on the existence of identified, illegal discrimination, whether committed by private or state actors. He stated in his concurring opinion: "[T]he distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation. . . ." 448 U.S. at 498. Congress' action was permissible in his view because refusals to subcontract to minority contractors could violate Title VII of the Civil Rights Act of 1964 or the Fourteenth Amendment, depending on the identity of the discriminating party. *Id.* at 506. It was also signifi-

In *Johnson*, this Court held that Title VII of the Civil Rights Act of 1964 does not require a public employer's voluntary affirmative action plan to be predicated on its own discrimination. 107 S. Ct. at 1451. To justify its affirmative action plan, an employer need not show that it has committed even an "arguable violation" of Title VII; all that is required is a showing of a manifest imbalance in a traditionally segregated job category. *Id.* at 1451-52. This is the requirement under Title VII even where, as in *Johnson*, the court affirmatively finds that the employer has not engaged in discrimination. *Id.* at 1466 (Scalia, J., dissenting).

A significantly different requirement should not be imposed under the Equal Protection Clause. Even if the prohibitions of Title VII and the Equal Protection Clause are not identical, a point about which there has been some dispute, they serve similar purposes.[61] In *Johnson*, this

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cant that Congress was a competent body to remedy the effects of this discrimination. *Id.* at 498 (Powell, J., concurring).

Justice Powell had applied the same rationale in *Bakke*, concluding that the state medical school's use of race-conscious measures was unconstitutional because it was not predicated on findings of identified discrimination made by a governmental body competent to make such findings. *Bakke*, 438 U.S. at 307-09. *See also Fullilove*, 448 U.S. at 498.

[61] Moreover, Title VII contains a prohibition on racial discrimination that is far more specific than the language in the Equal Protection Clause. Therefore, as Justice Scalia stated in *Johnson*, joined by Chief Justice Rehnquist and Justice White, "it is most unlikely that Title VII was intended to place a *lesser* restraint on discrimination by public actors than is established by the Constitution." 107 S. Ct. at 1469 (Scalia, J., dissenting) (emphasis in original). Justice O'Connor in *Johnson* also stated her view that "the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause." *Id.* at 1461 (O'Connor, J., concurring). In *Paradise*, 107 S. Ct. at 1075 n.1 (Powell, J., concurring), Justice Powell indicated his belief that the standards of analysis in Title VII and Equal Protection cases are similar, though not identical.

Court reasoned that requiring employers to present evidence of even an "arguable violation" of law could thwart voluntary affirmative action efforts, which can play a critical role in furthering Title VII's objective of " 'break[ing] down old patterns of racial segregation and hierarchy.' " *Id.* at 1450-51 (quoting *Weber*, 443 U.S. at 208).[62] The Equal Protection Clause of the Fourteenth Amendment, ratified into law as centuries of slavery were coming to an end, had an objective similar to and no less compelling than that of Title VII.[63] Requiring a municipality to present evidence of its own discrimination would undermine the goals of the Equal Protection Clause, just as it undermines the goals of Title VII.[64] Such a require-

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[62] The Richmond City Council in fact was very concerned that its enactment of a remedial plan not be construed as an admission of liability for past discrimination. When one Council member expressed concern that characterizing the plan as "remedial" might give rise to liability, the City's attorney responded:

> In the term remedial, we're not just implying that the City was intentionally discriminatory in the past. What we're saying is that there are statistics about the number of minorities which were awarded contracts in the past which would justify the remedial aspects of the legislation. We're not saying there was intentional discrimination in any particular case.

J.A. 15.

[63] *See Bakke*, 438 U.S. at 291 (Powell, J.) (the Fourteenth Amendment's " 'one pervading purpose' was 'the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from oppressions of those who had formerly exercised unlimited dominion over him' ") (quoting from *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 71 (1872)). It would be ironic to use the amendment to prevent the states from achieving that original purpose. "Those original aims persist. And that, in a distinct sense, is what 'affirmative action,' in the face of proper facts, is all about." *Bakke*, 438 U.S. at 405 (opinion of Blackmun, J.).

[64] Not only would such a requirement generate concerns about legal liability, but the process of requiring public officials to reopen the past could be painful and divisive to the community as a whole. A municipality that wishes to achieve racial equality should not have to take such risks in order to do so.

ment would be a dramatic departure from this Court's reasoning in *Johnson*.[65]

D. *Wygant v. Jackson Board of Education* Does Not Control This Case

The sole support cited by the court of appeals for its "governmental discrimination" requirement is language in the plurality opinion in *Wygant*. The portion of the opinion on which it relied is as follows:

> This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.

476 U.S. at 274 (plurality opinion). *See* J.S. App. 5a. The court of appeals incorrectly concluded that this language dictates the result in this case.

The language quoted above did not receive the support of a majority of this Court in *Wygant*, and in any event had little to do with even the holding of the plurality.

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[65] In *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986), this Court reaffirmed the proposition that there is a compelling governmental interest in remedying the effects of identified racial discrimination even where the government itself has not discriminated. The Court held that a district court was not statutorily or constitutionally prohibited from ordering a union and its apprenticeship committee to implement affirmative action policies to improve minority membership. The union and apprenticeship committee had been found guilty of egregious violations of Title VII by discriminating against racial minorities in recruitment, selection, training and admission to the union. Because of this discrimination, which was wholly private, the court's order survived even Justice Powell's strict scrutiny under the Equal Protection Clause. He stated that the finding of egregious Title VII violations "establishes, without a doubt, a compelling governmental interest sufficient to justify the imposition of a racially classified remedy." 106 S. Ct. at 3055 (Powell, J., concurring).

In contrast to *Fullilove*, *Wygant* involved issues very different from those presented here. Not only did it concern a layoff scheme in a school employment context, but the governmental interest supporting the layoffs was nothing like that supporting the Richmond plan. The court of appeals below simply misapplied *Wygant* to the facts of this case.

The court of appeals in *Wygant* had upheld a race-conscious layoff provision on the theory that a school board had an interest in providing minority role models for its minority students in order to alleviate the effects of societal discrimination. A plurality of the Court rejected the court of appeals' approach, reasoning that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." 476 U.S. at 276. Moreover, the key evidence in the record in *Wygant* simply was not probative of any sort of discrimination. As Justice Powell explained, "[t]here are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind. In fact, there is no apparent connection between the two groups." *Id.*

There thus was an absence of identified discrimination in *Wygant*; the Court never considered whether a local governmental body always must demonstrate its own discrimination in order to establish an "important" or "compelling" interest in its remedial plan.[66] It certainly never considered "governmental interest" issues in the public contracting context. The critical issues in the present case were neither addressed nor resolved in *Wygant*.

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[66] The Court did not consider the school board's claims that it in fact had engaged in past discrimination because a plurality of the Court found the school board's layoff provision an unconstitutional means to implement affirmative action policies in any event. *See Wygant*, 476 U.S. at 277 (plurality opinion).

At most, the plurality in *Wygant* held that societal discrimination alone, as exemplified by the lower court's role model theory, is insufficient to justify a racial classification.[67] The entire Court also reaffirmed the proposition that "remedying past or present racial discrimination by a state actor *is* a sufficiently weighty state interest" to justify a racial classification. *Id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis added). However, *Wygant* decided little or nothing about governmental interests that lie between these two extremes.[68]

Fullilove clearly is the precedent most relevant to this case. The governmental interest here is practically the same as that at issue in *Fullilove*, and is fundamentally different from that at issue in *Wygant*. Richmond's ordinance was not a remedy for "societal discrimination." It was predicated on identified, purposeful discrimination in Richmond's construction industry that had caused an extraordinary racial imbalance in the awarding of city construction contracts. The City was a passive participant in that discrimination almost every time it awarded

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[67] *Id.* at 274-76 (plurality opinion). As the term had been used in *Bakke*, "societal discrimination" simply meant unidentified discrimination by society at large. *See, e.g.*, 438 U.S. at 307 (Powell, J.). Prior to *Wygant*, the term had not been used to refer to all discrimination not committed by a state actor. In fact, this Court in *Fullilove* held that the interest in remedying private identified discrimination may support a government's use of racial classifications. *See supra* p. 35 & note 60.

[68] As Justice O'Connor pointed out in her separate opinion:

> [C]ertainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies.

Id. at 286 (O'Connor, concurring in part and concurring in the judgment).

a construction contract. Under these circumstances, Richmond had a substantial interest in opening for minority businesses the public contracting opportunities that long had been closed to them.

II. THE RICHMOND ORDINANCE IS SUFFICIENTLY NARROWLY TAILORED TO ACHIEVE ITS REMEDIAL PURPOSE

A state or local government must choose appropriate means to implement the ends of its affirmative action plan. This Court has identified a number of factors to be considered in determining whether a race-conscious plan employs constitutionally acceptable means to achieve its purpose. These include:

> the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Paradise, 107 S. Ct. at 1067 (plurality opinion).[69] When considered in light of these factors, the Richmond ordinance is sufficiently narrowly tailored to pass constitutional muster. It is a temporary, flexible plan that is designed to fit its remedial purpose and have minimal impact on the interests of non-minorities.[70]

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[69] These factors are almost identical to those set forth by Justice Powell in his concurring opinion in *Fullilove*, *see* 448 U.S. at 510-11, and considered by the district court below. *See supra* p. 12.

[70] The plan also was reasonably applied to appellee Croson. The district court so found after conducting an evidentiary hearing on the circumstances surrounding the refusal to award Croson a contract. J.S. Supp. App. 209-214 & n.20. The court of appeals did not disturb this factual finding.

A. The Richmond Ordinance Is Necessary To Remedy the Effects Of Racial Discrimination On City Construction Contracting And Has Minimal Adverse Impact On Non-Minorities

Once Richmond identified the problem that it faced, it enacted an ordinance that was well designed to correct that problem. The ordinance has minimal impact on non-minorities, and it preserves the competitiveness of the bidding process for city construction contracts.

As Congress found and this Court acknowledged in *Fullilove*, minority opportunities in public construction contracting have been limited by business practices that effectively perpetuate the effects of longstanding racial discrimination.[71] This clearly is the case in Richmond. Like Congress, the Richmond City Council had good reason to believe that there could be no change in the status quo without race-conscious affirmative action to break down barriers to minority opportunity in its public works program.

Richmond's ordinance was well designed to remedy the problems faced by minority-owned construction firms. These firms needed an opportunity to develop so that they could better compete in the marketplace, including the market for the City's construction contracts. Accordingly, none of the City's prime construction contracts have been set aside for minority businesses. Rather, the City more realistically chose to ensure opportunities for minorities at the subcontracting level. By teaming up minority businesses with more established, white-owned firms, the ordinance removes some obstacles that had kept existing minority firms out of public contract-

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[71] *See Fullilove*, 448 U.S. at 478 (plurality opinion) ("a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises . . . result[s] . . . from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination. . .").

ing, such as lack of a track record, access to financing to meet bonding requirements, and purposeful racial discrimination within the industry. *See supra* note 41. It also aids these firms by providing a source of revenue, giving them greater experience and credibility, and creating an opportunity to develop relationships with the more established contractors.

In addition, the ordinance encourages the formation of contracting firms by minorities that previously had seen little opportunity in construction contracting in Richmond. As this Court has stated: "Affirmative action 'promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices.'" *Sheet Metal Workers*, 106 S. Ct. at 3037 (plurality opinion) (quoting *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974)). In short, racial discrimination had created a "business system" [72] that had largely excluded minorities and had enabled white-owned firms to dominate the competition for city construction contracts; the Minority Business Utilization Plan was well designed to remedy the effects of this discrimination by bringing minority contractors into the business system and thus into a position to compete for city contracts.

The ordinance also has only a minor impact on non-minority contractors. Unlike white teachers who are laid off because of preferences given to minorities, *see Wygant*, 476 U.S. at 272 (plurality opinion), no contractor has a vested right to a public construction contract, or a portion thereof. Nor does the Richmond ordinance unsettle any contractor's "legitimate firmly rooted expectation." *Johnson*, 107 S. Ct. at 1455. As this Court recognized in *Fullilove*, the actual "burden" shouldered by non-minority firms is very light when the amount spent

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[72] *See supra* note 42 and accompanying text.

by the City on construction contracting is compared with overall construction opportunities.[73] Moreover, as this Court also observed in *Fullilove*, it is not unreasonable to assume "that in the past some non-minority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities." 448 U.S. at 485 (plurality opinion). In view of these considerations, any slight burden that the ordinance imposes on this group is constitutionally acceptable.

Because it does not set aside prime contracts for minority businesses, the ordinance also preserves the competitiveness of the bidding process for city construction contracts. It contemplates that minority businesses will be involved in this process as subcontractors. A minority contractor has every interest in making its price competitive, since that will enhance the prospect that its prime contractor will receive the contract. The ordinance therefore does not give minority firms any monopoly power.[74] Indeed, by opening up the pool of competitors, the ordinance is likely in the long run to increase the

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[73] 448 U.S. at 484 (plurality opinion). In the five years preceding the enactment of the Minority Business Utilization Plan, the City spent $124 million, or approximately $25 million per year, on construction contracts. According to the United States Bureau of the Census, between $220 and $280 million was spent each year on new construction projects in Richmond between 1978 and 1983. United States Bureau of the Census, May Report: "Value of New Construction Put in Place" (1986). These figures indicate that city construction projects account for approximately ten percent of all construction in Richmond. This means that the thirty percent minority subcontracting requirement accounts for only three percent of all construction contracting opportunities in Richmond.

[74] As the district court found, even if a minority business did have some monopoly power and tried to extract an unreasonably high price, the City could exclude that business from participation on the ground that it is not a "responsible" business. J.S. Supp. App. 186. The City has every financial incentive to ensure that minority businesses do not abuse the plan to obtain unfair profits.

competition for city contracts, and thus reduce costs to the city.[75]

B. The Ordinance Is Designed To Be Reasonable, Flexible And Temporary

The Minority Business Utilization Plan does not establish unreasonable, rigid quotas for the participation of minority-owned businesses in city construction contracts. Its waiver provision permits the plan to be applied in a flexible manner and limits its impact on non-minority contractors. In addition, the Richmond ordinance is temporary and benefits only bona fide minority-owned businesses.

The ordinance provides for five agencies to assist contractors in locating qualified minority businesses to participate in a construction contract. J.S. Supp. App. 67. If a prime contractor demonstrates that compliance with the subcontracting requirement is not feasible because sufficient qualified minority businesses are not available, the City waives or lowers the thirty percent requirement as appropriate. *Id.* at 65-70. The thirty percent requirement therefore is not a rigid numerical quota, but a goal that is waived or lowered in instances where it unduly burdens non-minority prime contractors and serves no remedial purpose.[76]

Particularly in light of the waiver provision, the choice of the thirty percent figure was reasonable. Tying the subcontracting requirement to the percentage of minority contractors in Richmond was not a viable option. Because the percentage of minority contractors was itself

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[75] For precisely this reason, the district court concluded that the Richmond ordinance was consistent with competitive principles. *Id.* at 142-46.

[76] The City also has a procedure whereby a disappointed bidder may protest an award or a decision to award a contract. As the district court found, this procedure may be used to protest the denial of a requested waiver once the contract has been awarded. *See* J.S. Supp. App. 192.

low as a result of discrimination, that approach only would have perpetuated that discrimination. Instead, the thirty percent figure is approximately midway between one percent—the percentage of city contracts awarded to minorities—and fifty percent—the percentage of minorities in Richmond. The ten percent set-aside upheld in *Fullilove* rested on similar logic. Justice Powell explained that the set-aside was reasonable because the figure "falls roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation." 448 U.S. at 513-14 (Powell, J., concurring). Arriving at the thirty percent figure " 'necessarily involve[d] a degree of approximation and imprecision,' " [77] but the choice was a reasonable one.[78]

The fact that the Richmond ordinance is temporary further enhances its reasonableness. The expiration date is consistent with the remedial nature of the ordinance. Because the ordinance was designed to last only five years, and virtually no minority firms had been receiving city construction contracts, it was highly unlikely that the ordinance would outlive its remedial purpose. J.A. 14. The ordinance is designed merely to *attain* a better racial balance in the awarding of city construction contracts, rather than to *maintain* a particular balance. *See Johnson*, 107 S. Ct. at 1456.

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[77] *Paradise*, 107 S. Ct. at 1072 (quoting *International Brotherhood of Teamsters*, 431 U.S. at 372).

[78] A similar choice for a similar purpose was made by the Office of Federal Contracts Compliance of the U.S. Department of Labor ("OFCCP"). OFCCP in 1980 set employment goals for the construction industry for standard metropolitan statistical areas ("SMSA") through the United States. 41 C.F.R. § 60-4 (1987); Notice, 45 Fed. Reg. 65984-91 (1980). It adopted a goal of 24.9% minority employment for the Richmond SMSA which, according to the 1970 census figures used by OFCCP, had a minority population of 25.5%. 45 Fed. Reg. at 65981, 65985. *See* U.S. Bureau of the Census, PC(1)-B48, General Population Characteristics Virginia, 1970 Census of Population (1970).

Finally, the Richmond ordinance has administrative provisions which, as the district court found, require the city contracting officer to deny minority business status to firms unless they are majority owned and actually controlled by minorities. J.S. Supp. App. 62, 215-19. The purpose of these provisions is to ensure that businesses participating in the plan are not "sham" minority businesses in fact controlled by whites. *Id.* at 218. The City takes this provision seriously, as illustrated by *Mega Contractors v. City of Richmond*, Civ. No. 84-0022-R (E.D. Va. Dec. 3, 1984), the companion case to this one below. In that case, the district court found that the City acted reasonably in denying minority business status to a contracting firm that was nominally owned by a minority group member but actually controlled and operated by whites. *See* J.S. Supp. App. 215-22.

CONCLUSION

For the reasons stated herein, this Court should reverse the decision of the court of appeals and uphold the constitutionality of Richmond's Minority Business Utilization Plan.

Respectfully submitted,

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No. 87-998

IN THE

Supreme Court of the United States

October Term, 1987

CITY OF RICHMOND

Appellant,

v.

J. A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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BRIEF ON BEHALF OF THE APPELLEE

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QUESTIONS PRESENTED

I. Does the equal protection clause require a governing body to show that it bears the responsibility for racial discrimination before it imposes a racial classification in the award of public contracts?

   A. The Appellant's Argument Assumes Facts which are not in the Record.
   B. The Record Should establish The Responsibility of The Governing Body For The Discrimination Being Remedied.
   C. Societal Discrimination Is Too Unrevealing To Permit A Governing Body To Adopt A Remedial Racial Classification.
   D. The Court Should Require That The Governing Body Has A Compelling Interest in Adopting The Racial Classification.

II. Must the record provide positive assurance that the racial classifications were necessary as a narrowly tailored remedy for discrimination for which the governing body is responsible?

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STATEMENT OF THE CASE

A.

DETAILS OF THE PLAN AND ORDINANCE

The City Minority Utilization Plan requires non-minority race contractors who are awarded construction contracts by the City to subcontract at least 30% of the dollar value of the contract to Minority Business Enterprises (MBEs). J. S. Supp. App. H at 247.[1] If the prime contractor is a minority business enterprise, the requirement that 30% be subcontracted to MBEs is inapplicable. *Id.*

The City's Plan was the product of two ordinances. The second ordinance, providing most of the Plan as it now stands, was adopted by the Council on April 11, 1983. J. S. Supp. App. H at 233, 249. It was an amendment to the City's general procurement procedures for purchasing the City's materials and services, which had been first adopted five months earlier. *See* Richmond, Va., Ordinance No. 82-294-270 (December 20, 1982), Code Ch. 24.1.

The expressly stated purpose of the Plan was:

> "This article is remedial and is enacted for the purpose of promoting wider participation by minority business enterprises in the construction of public projects, either as general con-

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[1] References to the Appendices will follow the form used by Appellant. The Joint Appendix, which contains the transcript of the hearing before City Council prior to adoption of the Ordinance at issue, is cited J. A. at . . . . The Appendix to the Jurisdictional Statement, which contains the Opinion of the Court of Appeals, is cited J. S. App. A at . . . a. The Supplemental Appendix to the Jurisdictional Statement, which contains lower court opinions and the Ordinance, is cited J. S. Supp. App. . . . at . . . . References to the record will be cited by Exhibit number Ex. . . . .

tractors or subcontractors." J. S. Supp. App. H at 248.

The Plan defines an MBE as "a business at least fifty-one percent minority-owned and operated by minority group members or, in the case of a stock corporation, at least fifty-one percent of the stock of which is owned and controlled by minority group members." J. S. Supp. App. H at 248. The Plan defines "minority group members" as "citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." Richmond, Va. Code ch. 24-1, art. I(F) (Part B) Paragraph 27.20, and VIII-A (1983); J. S. Supp. App. H at 241. A bidder, who is not otherwise a minority, has ten days after notification that he is the low bidder to submit a completed form designating the minority contractor whose work will constitute 30% of the contract. Ex. 14.

The Plan lacks a number of features which others use to avoid imposing rigid numerical quotas. (1) By administrative policy, waivers of the 30% utilization requirement are to be granted only when every feasible effort has been made to comply *and* qualified MBEs are unavailable or unwilling to participate. Ex. 14. (2) There is no requirement that the minority contractor or subcontractor perform any useful service on the contract, just that he receive 30% of the contract amount. (3) Nothing in the Plan precludes a minority from subcontracting its share back to a non-minority firm. (4) The plan includes racial minorities without regard to their economic or social status—there are no limitations on net worth or gross sales. (5) There is no "graduation requirement" for any firm which becomes able to compete without the protection of preferences. (6) There is no limitation on residency, which would focus the remedial effort on the Richmond area.

B.

The Bidding Process and Waiver Application.

This appeal presents challenges to the adequacy of the required factual predicate for adopting the ordinance and the failure to adapt its provisions to remedy an identified problem. But the facts bearing on the administration of the ordinance remain important because they show how inflexibly civil servants administer such a law once it is enacted. The difficulty imposed on a bidder who is not a member of one of the races selected for inclusion in the law is also illustrated.

There is no issue as to the good faith of either party.

Appellee J. A. Croson Company ("Croson"), an Ohio corporation, is a contractor which submitted the low bid on a project to install stainless steel plumbing fixtures in the Richmond City Jail. Croson had not done business with the City before. Deposition of Eugene Bonn, Ex. 17c at 4. Croson was awarded the contract contingent on complying with the minority utilization requirement.

The fixtures were especially designed for use in a penal institution, so that only two manufacturers met the required specifications. The cost of the fixtures represented approximately 75% of the cost of the project. Croson's regional manager, Eugene Bonn, determined that the only way in which to satisfy the City's requirement that 30% of the contract be awarded to a minority owned firm was to obtain a minority supplier for the fixtures. J. S. Supp. App. G at 121. Bonn had prior knowledge that there were no minority suppliers. The project had been out for bid previously, and although Croson had not submitted a bid, Bonn testified that he had then contacted minority suppliers in Pittsburgh and North Dakota in an unsuccessful attempt to secure minority participation by minority suppliers. Deposition

of Eugene Bonn, Ex. 17c at 14-15.

On September 30, the day he received the bid documents, Bonn contacted a number of minority businesses listed as plumbing suppliers with the Virginia Office of Minority Business Enterprise, the Richmond Human Relations Commission, and the Richmond Redevelopment and Housing Authority. He informed the firms about the project and how to obtain the specifications necessary to quote a price on the fixtures. Deposition of Eugene Bonn, Ex. 17c at 21; J. S. Supp. App. G at 121. Bonn contacted the referrals again on October 12, the last day on which bids could be submitted, to inquire whether any would be quoting him a price. No minority firm quoted a price, so Bonn submitted his bid of $126,530.00 using a quote from a non-minority firm which regularly supplied such items. Bonn had received quotes directly from three non-minority suppliers. Bonn Dep. at 7. Testimony showed that none of the minority firms contacted by Bonn were suppliers of plumbing equipment made by the two manufacturers of the specified product. Deposition of Curtis Johnson, Ex. 17d at 11-12; Deposition of Wallace Green, Ex. 17f at 4, 6; Deposition of Donald Sparrow, Ex. 17a at 22, 34. None testified that they knew that they could have arranged to supply the product.

Melvin Brown, a principal in a Richmond business called Continental Metal Hose, Inc., was contacted by Croson on October 12. There was a conflict in testimony as to whether Continental had been contacted on September 30 to quote a price. Bonn produced telephone toll records to show that he had contacted the other firms on his list on September 30 and had notes (Ex. 11) showing that Continental Metal Hose was on his list. At least one of the firms contacted returned calls to Bonn. Deposition of Wallace Green, Ex. 17 at 10. Bonn testified

as to the content of his conversations with Brown. Since Continental Metal Hose was a local firm, there was no toll record.

The District court found it unnecessary to resolve the conflict in testimony. J. S. Sup. App. G at 190.[2]

On October 12, Bonn gave Brown the name of a distributor from whom Brown could obtain prices. The distributor refused because Brown had not established credit and the purchase price was in excess of $80,000. Deposition of Melvin Brown, Ex. 17(b) at 15, 22. Brown also requested prices from a supplier who had already quoted a price to Bonn and was refused. J. S. Supp. App. G at 125. Brown attended the bid opening on October 13 and advised Bonn that he would attempt to supply the fixtures. Brown gave Bonn literature which described Continental Metal Hose as a dealer in metal pipes and hoses. Transcript of hearing, United States District Court, February 20, 1984, at 11. Bonn advised Brown of the names of two manufacturers of approved products. *Id.* at 13. In order to be able to supply the fixtures, Brown would have to be approved as a supplier by one of the two manufacturers of the approved products. *Id.* at 19.

On October 19, Bonn requested that the City waive its 30% minority utilization requirement on grounds that no qualified minority supplier was available. Waivers were required to be obtained within 10 days of the bid opening, or the contractor would be deemed to be in noncompliance; the City has three days to act on a

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[2] The District Court also stated that under *Fullilove* it would not be unconstitutional if, after every feasible effort to obtain minority participation had been made, the ordinance permitted a minority to appear after bids were opened and force the contractor to rework his bid. J. S. Supp. App. G at 229, n. 14, citing *Fullilove*, 448 U.S. at 492-93.

request for waiver. Ex. 14. On October 27, the day Brown learned Croson had asked for a waiver of the MBE requirement, Brown asked Bonn for the name of the second manufacturer's representative. J. S. Supp. App. G at 124. On October 31, Brown submitted a quote based on prices supplied by the second manufacturer's representative. J. S. Supp. App. G at 124-125. On that date, Brown called the Director of Purchasing and Stores for the City, and advised him that he had obtained a price. J. S. Supp. App. at 125. Brown added a $7,663.15 markup to his quote to Croson, which was $6,183.29 higher than the customary mark-up and Bonn's other quote. Transcript, Circuit Court of City of Richmond Ex. 18 at 45-46. Bonn advised the City that not only was Brown not a qualified supplier, but that the price he did quote was unreasonably high.

On November 18, the City advised Croson that it was cancelling the bids and was rebidding the contract. Bonn sought to appeal the decision and was advised that there was no appeal of a decision to rebid a contract. J. S. Supp. App. G at 129; Ex. 9. On December 16, Brown was notified by the manufacturer's representative that he was approved as a distributor ". . . in the event they are the successful bidder with respect to the replacement plumbing fixtures for the Richmond City Jail." Ex. 16.

At the hearing on motion for preliminary injunction in the Circuit Court of the City of Richmond prior to removal upon motion of the City to the United States District Court, the City testified that, since Continental Metal Hose was listed as a plumbing supplier with the various minority business referral sources it consulted, Continental Metal Hose was deemed to be an available minority business enterprise (MBE), and that no effort was made to ascertain whether Brown was in fact able to supply the equipment. Transcript, Ex. 18, at 21-22. The

City further testified that the price a minority contractor quoted was of no concern to the City. Deposition of Vernon Williams, Ex. 17(g) at 48-49; Deposition of H. R. Wall, Ex. 17(h) at 56-57.

Brown testified that he was charging ". . . whatever the market will bear." Transcript, Ex. 18 at 91.

C.

Adoption of The Ordinance

The most that can be said for the process employed by City Council is that it afforded the public the chance to comment on the Plan before it was put to a vote.

At the conclusion of a five hour Council meeting, the City held a two hour hearing in which five persons spoke against and two spoke for the need for the Plan. The hearing was the public hearing required by law, upon five days notice, for the adoption of any city ordinance after the ordinance has been introduced. *See* Richmond City Charter, Section 4.10, Acts of Assembly [Virginia] ch. 120 (1964). The hearing was not held for the purpose of ascertaining the nature of any problem which may require remedial action. Council debate is not a required part of the hearing. J.A. at 17.

The Plan was introduced by one of its two sponsors (Council members Richardson and Marsh) who described its purpose as being "to have those dollars recycled back to minority businesses . . ." J.A. at 12. No testimony from the citizens who spoke in favor of the Plan identified any basis for enacting the ordinance. Neither of the two proponents was connected with the construction industry. The tenor of the remarks of the first speaker was that other cities had such Plans and it was time for Richmond to have one. J.A. at 18-19. The other mentioned "a kind of closed atmosphere to entertaining new companies and new ideas and new vendors

here in the Richmond area." J.A. at 17. One of the sponsors of the Plan commented that blacks were victims of discrimination "in the construction industry in this area." J.A. at 41. No explanation of the nature of the discrimination was offered and this remark came in debate among Council members after the close of testimony. J.A. at 41. Apparently failing to recognize that opponents had no further opportunity to speak, Judge Sprouse's dissent described this as "unchallenged statements of council members." J. S. App. A at 16a. The sponsor then handed the clerk a listing of the contract amounts which had been awarded from 1978 through the first two months of 1983. That list (and a subsequently prepared list of prime contractors who received the contracts) appears as Exhibit 20. The list represents the only data that Council had before it. No speaker saw it. The sponsor stated at that time that only .67% of the City's prime contracts had been awarded to minority firms. No documentation of this was provided. The list of contractors does not indicate which were MBEs. J.A. at 41. The figure was not made available prior to the hearing. J. S. App. A at 16a.

There was no identification of the basis for choosing a 30% set-aside figure.

The vote in favor of adopting the Plan was along racial lines with the five black members and one of the four white members of the Council voting for it. J.A. at 49.

In contrast to the City's historical experience with prime contractors, City Officials were aware that the prime contractors were utilizing minority subcontractors at a significantly greater rate. In reply to a question from a council member, the City Manager stated that the City's experience with minority utilization was about 7 or 8% of the total. J.A. at 16. On the Community

Development Block Grant Program, which had a 10% utilization goal, minority utilization was between 17% and 22%. J.A. at 16. When the discussion among council members turned to the level of activity of subcontractors, one of the sponsors of the Plan suggested that the public hearing should continue. J.A. at 17.

Opponents of the Plan testified that the Plan would be counterproductive because of the lack of available minority subcontractors. The lack of available local qualified contractors to work on fixed price government contracts was attributed to licensure requirements (J.A. at 32), lack of ability to estimate costs (J.A. at 36), bonding requirements and financial capabilities. J.A. at 37. Most of the trade associations which spoke mentioned efforts to recruit minority members. None were accused of discrimination by any speaker or member of Council, nor were they afforded the opportunity to respond to the broad allegations of racism and discrimination leveled at them for the first time in the City's brief.

The City's position in its "Petition for Rehearing and Suggestion for Hearing in Banc" in the Court of Appeals was that (1) it has the right to rely on the congressional findings of private and governmental discrimination (Petition at 9); and (2) that the "discriminatory barriers" that the City seeks to address through racial classification include:

> The MBE must also overcome proven obstacles to market entry, obstacles identified and discussed in *Fullilove*, including obtaining the necessary working capital, insurance, and bonding, as well as developing a "track record." If the MBE does not overcome each of the obstacles, the City of Richmond's hands are tied. It has no contracting choice but to deal almost exclu-

> sively, with nonminority contractors, as was the city's experience until the very recent past." Petition for Rehearing at 12.[3]

Appellee does not question the entitlement of the City to address such race-neutral barriers, but disputes the use of racial classifications as the means of doing so.

The City attorney expressly disavowed "intentional discrimination [by the City] in any particular case but relied on general discrimination by the construction industry cited in *Fullilove*. J.A. at 15.

SUMMARY OF ARGUMENT

This case presents to the court the narrow issue whether showing that a low percentage of awards of *prime contracts* to minority race contractors justifies adoption of a requirement that non-minority contractor subcontract 30% of the contracts to minority businesses.

It is assumed for purposes of argument that local governments can in proper circumstances adopt percentage requirements for the use of minority subcontractors. Appellee contends that in this case the record fails to disclose a proper basis for adoption of the racial classification.

Evaluating the constitutionality of race-conscious legal remedies under the equal protection clause of the

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[3] Other documents produced by the City in discovery showed that construction purchase orders (under $10,000) were awarded to minority firms at a 10.5% rate. It was known to counsel for both parties at trial that the City had active programs of minority utilization that were producing results significantly in excess of the representation of minority firms in the general population. That is why, at trial, there were no references to discrimination by the City or the construction industry. The references in the Brief on behalf of the City that minorities had been receiving "virtually none of Richmond's public construction contracts" are both inaccurate and not supported by the record. Brief on Behalf of Appellant, at 3.

fourteenth amendment requires a two-part analysis: first, that there be a compelling interest in adopting the remedy; and, second, that the remedy adopted be subject to strict scrutiny to assure that it is narrowly tailored to achieve the remedial purpose. Societal discrimination does not constitute a compelling interest in adopting the remedial racial classification.

It cannot be said that City Council was acting to remedy past discrimination by the City because the assumed societal discrimination is not probative of discrimination by the City. In addition, no effort was made to conform the terms of the remedy to any identified problem.

ARGUMENT

I

The Equal Protection Clause Requires a Governing Body to Show That It Bears the Responsibility for Racial Discrimination Before It Imposes a Racial Classification In the Award of Public Contracts.

A.

THE APPELLANT'S ARGUMENT ASSUMES FACTS WHICH ARE NOT IN THE RECORD.

This case presents issues, in a very precise factual context, regarding the extent to which governments may adopt racial classifications in the award of public contracts. A City Council member stated that .67% of the City's prime contracts had been awarded to minority contractors, and the Appellee has accepted the representation. (In *Fullilove*, .65% of contracts had been awarded minorities. 488 U.S. at 465.) However the Appellant and several briefs *amicus curiae* ask this Court to attribute a significance to the low rate of participation of minority firms which is unsupported by the record. This is not to

underestimate the impact of societal discrimination. However, this does not establish the Appellant's allegations, raised for the first time in this Court, of "a distribution of public contracts only to businesses owned by whites" or of "identified local industry discrimination," or "that minority businesses were receiving virtually none of the City's public construction contracts." Brief of Appellant at 14, 17, 19.

This belies the unfounded assertion now contained in the Appellant's brief of such charges as "longstanding pervasive racial discrimination in the construction industry" (Brief on Behalf of Appellant, at 14), that there was "identified local industry discrimination" (*Id.* at 15), "exclusion by unlawful racial discrimination" (*Id.* at 15), "pervasive unlawful industry discrimination" (*Id.* at 16); "a distribution of public contracts only to businesses owned by whites" (*Id.* at 17); "minority businesses were receiving virtually none of the City's public construction contracts." (*Id.* at 19.) Comments by a sponsor of the Plan are presented in the Appellant's Brief as "including the testimony of a former Richmond mayor." *Id.* at 23. From the fact that discrimination was not mentioned by any of the citizens who spoke at the hearing, the City's Brief infers "identified, pervasive, unlawful discrimination on its public works program." *Id.* at 33. In the District Court none of these charges were made.

Of course to reach the conclusion that the Plan was needed, the City Council needed to ignore the testimony of all the speakers, none of whom ever referred to the existence of discrimination. That a sponsor of the Plan mentioned his knowledge of discrimination in the construction industry adds nothing.

Thus, the pertinent facts are that the Plan was adopted upon a belief that .67% of $124 million of certain of the City's contracts were being awarded to minority

prime contractors. There is no other information in the record about that figure that adds anything to the recognition of societal discrimination.

Obviously, since the law would require non-minority firms to subcontract 30% of the contract price to minorities, the only useful statistics would be a comparison of participation of minority firms as subcontractors in relation to their availability. This would establish the parameters of any problem and would provide guidance as to the desirable terms of any law which would be enacted.

The use of the .67% figure simply fails to compare relevant populations. The threshold rule is that relevant populations must be compared in order to have a basis for further inquiry into the existence and nature of a problem. No decision of this Court has approved a race conscious legal remedy absent discrimination "traceable to [the governmental agency's] own actions." *Wygant*, 476 U.S. at 266 (O'Connor J., concurring).

Since the ordinance imposes a subcontracting requirement, it is possible that the quota could be achieved and the number of awards to prime contractors could be unaffected. In the instant case, the minority supplier was being "approved" as a distributor for this one project only, and only if Croson were to be awarded the contract by the City. Ex. 16. Not only does it serve no business interest for a contractor to purchase the product for $6,000 more from one who is not his regular supplier, but there was nothing about this contract which would encourage the minority business to become a prime contractor appearing on a list like that introduced at the hearing before City Council.

The factors identified by the City Attorney as barriers to entry (*supra*, p.9) were experience, financing, insurance, and bonding. The same factors were identified

in testimony at the hearing. J. A. at 32, 36, 37. The Record is equally probative of nondiscrimination. The laws prohibiting discrimination have been on the books for many years and there is no reported case brought against the City for discrimination in the award of City contracts. Nor have there been any relevant actions against the City by contractors alleging discrimination in the award of public contracts. *See Fullilove*, 448 U. S. at 540 (Stevens, J., dissenting.)

B.

THE RECORD SHOULD ESTABLISH THE RESPONSIBILITY OF THE GOVERNING BODY FOR THE DISCRIMINATION BEING REMEDIED.

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) which is the fullest and most recent expression of a plurality of this Court, establishes an efficacious method of assuring that race-conscious legal remedies for discrimination adopted by local governing bodies are consistent with protections provided by the equal protection clause. That is, before an asserted governmental interest in adopting a racial preference can be accepted as "compelling,"[4] there must be findings[5] of "prior discrimination by the governmental unit involved." *Wygant*, 476 U.S. at 274 (Powell, J., plurality opinion). And further, if this finding is to be drawn from mere statistical evidence, the evidence must focus on the population that is relevant for comparative purposes, such as the availability of qualified minorities in the relevant construction businesses. *Id.* at 275–26.[6]

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[4] The use of the term compelling interest to describe the asserted governmental interest is set forth in Argument Ic, *infra*.

[5] See p. 26, *infra*.

[6] The Court should reject appellant's suggestion that it is unreasonable to require that a legislative body make a factual

Dean Choper has noted that

> The extent to which the equal protection clause of the fourteenth amendment . . . permits government to use racial classification to remedy prior racial discrimination is one of the most significant and controversial issues of our time. Choper, *Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle*, 72 Iowa L. Rev. 255 (1987).

This Court has approved a number of voluntarily adopted racial classifications, but always in situations in which competent findings were made that the racial classification was to remedy discrimination by the actor involved. *Wygant*, 476 U.S. at 274 (Powell, J.)[7]; *Fulli-*

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record. Since it is uncontested that the purpose for adopting the Plan is centeral to determination of its validity, it is natural that the City must make a record which justifies the remedial purpose of the Plan. In administrative law there is a clear parallel. *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1946) acknowledged the "fundamental" rule that administrative agencies must clearly state the basis upon which their determinations and judgments rest. This judge-made principle has been codified as part of the Administrative Procedure Act. 5 U.S.C. Section 553(c); *Cf. National Black Media Coalition v. F.C.C.*, 775 F.2d 342 (D.C. Cir. 1985) (in holding that low minority employment is a basis for sanction, agency must offer sufficient explanation to ensure court that it is not repudiating precedent simply to conform with a shifting political mood). Where no basis or an inadequate basis is offered, the court is not at liberty to substitute its own basis. *Chenery*, 332 U.S. at 196.

[7] Appellant has suggested that there was a burden on the party attacking the racial classification to rebut the "inference of discrimination" created by the statistics. Brief of Appellant at 27. However, the plaintiff adduced all of the reasons given by the City for enacting the ordinance and introduced them into evidence. Plaintiff argued the reasons to be insufficient in law in part because the comparison

love, 448 U.S. at 497 (Powell, J. concurring) Voluntarily imposed race-based classifications as remedies for one's own discrimination is perhaps an evolution away from the views of Justice Douglas, who rejected the idea that racial set-asides in law school admissions could be justified by a "compelling interest;"

> "If discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it, then constitutional guarantees acquire an accordianlike quality." *DeFunis* v. *Odegaard*, 416 U.S. 312, 341 (1974) (Douglas, J., dissenting.)

Justice Douglas, urged that remedial efforts be race neutral. *Id.* at 340.

That the principles articulated by the *Wygant* plurality have proved practical is seen in their application to uphold remedial classifications in *United States* v. *Paradise*, 107 S. Ct. 1053 (1987); *Johnson* v. *Transportation Agency, Santa Clara County*, 107 S. Ct. 1442 (1986); and *Local 28 of the Sheet Metal Workers Int'l Ass'n* v. *E.E.O.C.*, 478 U.S. 421 (1986).

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of minority participation with general population statistics is not competent to justify adoption of a race-conscious legal remedy. The City disagreed and decided not to introduce additional evidence where the profferred statutes were incompetent. In *Hazelwood*, the plaintiff was not required to go forth with additional evidence where the profferred statistics were incompetent. 433 U.S. at 303-04. Employment cases which have attached weight to the low representation of minorities in the work force are distinguishable on a number of grounds—most importantly that the proof was not being offerred to justify imposition of a race-conscious legal remedy for societal discrimination. *See, e.g. International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (use of statistics plus anecdotal evidence); *Johnson v. Transportation Agency, Santa Clara County*, 107 S.Ct. 1442 (1987) (sex as a factor in selection.)

In addition, those circuits which have considered the issue since *Wygant* have uniformly rejected the argument that a race conscious remedy is justified upon a recognition of generalized discrimination or by unrefined statistical comparisons showing a low participation by minorities. Such statistics merely reflect to an unknown extent the existence of the same societal discrimination. *See Michigan Road Builders Association, Inc.* v. *Milliken*, 834 F.2d 583 (6th Cir. 1987); *Associated General Contractors of California* v. *City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987) (failure to consider awards of contracts to minority subcontractors as well as minority prime contractors); *J. Edinger & Son* v. *City of Louisville*, 802 F.2d 213 (6th Cir. 1986); *Janowiak* v. *City of South Bend* 836 F.2d 1034 (7th Cir. 1987). The *Wygant* analysis was applied to strike down a requirement of racial quotas favoring whites in public housing in *United States* v. *Starrett City Associates*, 840 F.2d 1096 (2d Cir. 1988).

The point is not that the governmental body must conclude that it is guilty of discrimination. Nor can it relieve itself from scrutiny of the constitutional question by admitting discrimination. *Wygant*, 476 U.S. at 279, n.5. (Powell, J.). Rather, if the race-based action is taken to remedy past discrimination by the governmental body, then a fact finder must be able to determine whether the employer was justified in instituting a remedial plan. *Ibid.* As Dean Choper has written, "In other words, the trial court must find that the government agency was attempting to remedy its prior unlawful conduct." Choper, *supra*, at 265–266. No such finding is present in this case. The trial court held that the City was remedying "present adverse effects of past discrimination in the construction industry." J. S. Supp. App. G at 163.

Thus, this Court has required that care be taken to establish that an identified disparity is in fact caused by discrimination. *Hazelwood School District* v. *United States*, 433 U.S. 299, 308, n. 13 (1977) identified the inadequacy of comparing percentages of teachers with the representation of minorities in the general population; *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) approved a race-conscious legal remedy ordered by a court where discrimination by the governing body had been established. The Court criticized the concept of remedial racial quotas:

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance, or mixing, that approach would be disapproved. . . . *Id.* at 24.

In *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 3012 (1986), five justices held that the mere fact of low minority participation in voluntary clubs failed to establish the existence of discrimination in the activities of North Carolina's Cooperative Extension Service. The Court also held that where the Service was administered by race-neutral programs low minority participation was not evidence of discrimination. *Id.* 106 S.Ct. at 3012. (White J., concurring).

C.

Societal Discrimination Is Too Unrevealing To Permit A Governing Body to Adopt a Remedial Racial Classification.

A disparity with general population statistics has never been held to establish discrimination under a

constitutional standard.[8]

Justice Powell has described societal discrimination, the belief that members of certain groups face discrimination in all their activity on a continuous basis, as "an amorphous concept of injury that may be ageless in its reach into the past." *University of California Regents v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J.). Societal discrimination is discrimination not traceable to a governmental agency's own action. *See Wygant*, 476 U.S. at 266 (O'Conner, J.). Societal discrimination does not justify a classification that imposes disadvantages upon persons who bear no responsibility for whatever harm the minorities included in the coverage of the City's ordinance are thought to have suffered. *Id.* at 310, *Accord Fullilove*, 448 U.S. 448 (1980) (Stevens, J., dissenting.).

The City would convert a remedy which the Court has previously reserved for proven violations of legal rights into a privilege that could be granted to any group characterized by the City Council as victims of societal

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[8] In *Fullilove*, 448 U.S. at 448 (1980), the Court gave deference to the special competence of the Congress to correct societal discrimination, *Id.* at 472 (Burger, C.J.), noting that the broad remedial powers of Congress were distinguishable from the limited remedial powers of a federal court. *Id.* at 482. The Court also noted that the regulations implementing the Act were to benefit small and disadvantaged businesses owned by socially or economically disadvantaged persons and not just the specified minority groups. *Id.* at 463. Members of the minority groups who were not disadvantaged were excluded. *Id.* at 466, 472. One barrier to minority firms being awarded federal contracts was the exercise of discretion by government procurement officers to disfavor minority businesses. *Id.* at 467. "In my view . . . Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of government contracts awarded minority contractors." *Id.* at 503 (Powell, J.).

discrimination. The City lacks a compelling interest in such a policy:

> "One such purpose appears to have been to assure to minority contractors a certain percentage of federally funded public works contracts. But since the guarantee of equal protection immunizes from capricious governmental treatment 'persons'—not 'races'—it can never countenance laws that seek racial balance as a goal in and of itself." *Fullilove*, 448 U.S. at 529-30 (Stevens, J., dissenting), citing *Bakke*, 438 U.S. at 307 (Powell, J., concurring).

A major failing of societal discrimination as the basis for adopting racial preferences lies in that it has no outer limits. It allows the governing body to engage in discriminatory relief long past the point required by an legitimate remedial purpose. *Wygant*, 476 U.S. at 275 (Powell, J.). Race-based allocations of public contracts should not be permitted after the discriminatory conduct ceases. *See Swann, supra*, 402 U.S. at 31–32.

Societal discrimination thus proves too much. As a test for adopting race-based classification it permits expansion beyond the carefully articulated exceptions recognized in the case law.

Describing the City's role as one of passive participation, Brief for Appellant at 40-41, is not distinguishable from societal discrimination. Passive participation in discrimination should not be grounds for imposition of a race-based remedy. Vicarious liability is not grounds for imposition of racial classifications under civil rights acts, so it should not be permitted under the equal protection clause. See *Bazemore*, *supra* 478 U.S. 385 (1986); General Building Contractors, *infra* at 26, 458 U.S. 375 (1982).

The tendency of proponents of race conscious legal remedies to rely on broad brush assumptions of the effect of societal discrimination has been noted in Days, *Fullilove*, 96 Yale L.J. 453 (1987). The author, who represented the United States in its successful defense of the minority set-aside program in *Fullilove*, cogently argues that most minority set-asides developed after *Fullilove* have been poorly designed and implemented. He recognizes the courts' failure to compel heightened accountability on the part of federal, state, and local governments—by emphasizing competence, findings, and means:

> "It is difficult to criticize the efforts of people of goodwill seeking to rid our society of its unfortunate legacy of racial discrimination. I would be the first to argue that minority business set-asides have been proposed, adopted and judicially sanctioned by people acting out of the very best of motives. But more than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system. It must be shown that such a system is responsive to findings of racial discrimination, is designed to redress that problem, and is employed only as long as necessary to achieve its remedial objective. These standards were not met by the Public Works Employment Act. of 1977. They were not demanded of Congress by the Supreme Court which upheld the Act in *Fullilove*, and they have not characterized subsequent set-aside programs at any level of government. This is an indefensible state of affairs that threatens to undermine the principle of affirmative action and the appropriate use of ex-

> plicit race-conscious remedies for racial discrimination. It ought to stop. *Id.* at 485.

Days writes in detail about deficiencies which frequently are encountered in affirmative actions which allocate scarce resources: lack of scrutiny and testing of means to ends, failure to examine various remedies, and third, when such plans have become the subject of litigation, proponents of affirmative action in general have felt compelled to defend them in unqualified terms instead of helping the courts to develop criteria that separate permissible from impermissible programs, differentiating the plans that are well designed to counteract discrimination from those that promise no such result. *Id.* at 459.

James Madison's expression of the fear that governments with small constituencies are more likely to be oppressive is illustrative:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other. *The Federalist* No. 10, at 22 (J. Madison) (2d ed. Johns Hopkins Univ. Press 1966).

This Court tested a remedy formulated by a federal District Court in *United States* v. *Paradise*, 107 S. Ct. 1053 (1987) under a compelling interest standard. There would appear to be every reason to insist that a City be held to an equally high standard.

D.

THE COURT SHOULD REQUIRE THE RECORD TO SHOW THAT THE GOVERNING BODY HAS A COMPELLING INTEREST IN ADOPTING THE RACIAL CLASSIFICATION.

This court should articulate that the interest required to justify enactment of a race-conscious legal remedy must be narrowly tailored to achieve a "compelling interest." This was the standard adopted by the plurality opinion in *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring). The point is that it should be clear that the remedy in question is remedying discrimination. Professor Ely has described this process as "insisting that the classification in issue fit a constitutionally permissible goal with greater precision than any permissible alternative." Ely, *Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727, n. 26 (1974).

The compelling interest analysis was employed in the plurality opinion in *United States v. Paradise*, 107 S.Ct. 1053 (1987) (Brennan, J., plurality opinion) to uphold a judicial remedy imposed by a court in a case of proven violations. Similarly, *Local 28 of the Sheet Metal Workers International Ass'n v. E.E.O.C.*, 478 U.S. 421, 106 S.Ct. at 3019 (1986), affirmed a court-ordered remedy which was found to be narrowly tailored to further the government's "compelling interest in remedying past discrimination." *Id.* 106 S.Ct. at 3053 (Brennan, J., pluralty opinion).

The City contends that the record in the instant case is adequate to establish the existence of a compelling interest. Brief for Appellant at 20. While some of the

briefs *amicus curiae* on behalf of the Appellant argue for a less restrictive standard, all concur in the Appellant's argument that the low number of black prime contractors on certain projects creates a compelling interest in adopting the 30% minority subcontractor utilization requirement.[9]

It is clear, in the case of a legislative enactment to remedy discrimination, that its failure to be "narrowly tailored to achieve a compelling governmental interest" will result in adoption of race-conscious legal remedies without the requisite showing that the action is really remedying past discrimination. Courts of Appeals are finding that legislative bodies enacting racial preferences pursuant to tests of a different label have given inadequate consideration to whether the plan in question was shown to be a remedy for past discrimination. In *Wygant* the Court of Appeals had found the governmental interest to be "sufficiently important." 476 U.S. at 274-78. *Michigan Road Builders v. Milliken*, 834 F.2d 583, 594 (6th Cir., 1987), rejected the District Court's holding that the State need only demonstrate "a significant interest in ameliorating the present effects of past discrimination rather than the 'compelling interest' standard." Using the significant interest test the District Court had found the record sufficient to establish "past intentional discrimination." *Michigan Road Builders v. Milliken*, 571

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[9] *Johnson v. Transportation Agency, Santa Clara County*, 107 S.Ct. 1442 (1986) relied on the provisions of Title VII to hold that gender could be considered "as one factor", *Id.* at 1455, where there were no women employees, if a "manifest imbalance" was determined by a comparison between the percentage of minority as women in the employer's work force *with those in the labor force who possess the relevant qualifications*. *Id.* at 1452.

F. Supp. 173, 187 (E.D. Mich. 1983).[10]

This is not to say that there is a compelling interest in enacting racial classifications to remedy societal discrimination.

A governing body which is otherwise competent to do so may have a compelling interest in adopting legislative enactments which prohibit discrimination. Such was the case in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), which involved a provision of the Minnesota Human Rights Act which makes it an "unfair discriminatory practice" to deny access to places of public accommodation based on sex. *Id.* at 615. The Supreme Court of Minnesota accepted certification from the District Court whether the Jaycees was a place of public accommodation. *Id.* at 616. This Court held that the Minnesota Act "' responds precisely to the substantive problem which legitimately concerns' the State and abridges no more speech or associational freedom than is necessary to accomplish that purpose." *Id.* at 629. Minnesota's "compelling interest" in eradicating discrimination justified enactment of the statute. *Id.* at 623.

However, this exercise of a compelling interest is significantly different from the showing of a compelling interest by a governing body seeking to impose a race-conscious legal remedy in the absence of violation. This is using a racial classification to exclude persons from a commercial benefit without a showing that any of the

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[10] In *Janowiak v. The Corporate City South Bend*, 836 F.2d 1034 (7th Cir. 1987), the Court of Appeals ruled that an affirmative action plan, which resulted in a better qualified white worker being passed over by a minority, had been based on an inadequate factual predicate. This was vacated and remanded for consideration in light of *Wygant* and *Johnson*. 107 S. Ct. 1620 (1987). On remand the Court of Appeals held that there was no showing of prior discrimination by the City. *Janowiak*, 836 F.2d at 1041-42.

excluded persons committed a wrong.

In *General Building Contractors v. Pennsylvania*, 458 U.S. 375, 400 (1982), this Court held that minority hiring quotas could not be imposed, under 42 U.S.C. Section 1981, upon a construction contractors' trade association absent a finding of intentional discrimination.

In the instant case, the City imposed a remedy without first finding a violation, and in this it has no compelling interest.

II.

The Record Must Provide Positive Assurance That Racial Restrictions Were Necessary As a Narrowly Tailored Remedy for Discrimination for Which The Governing Body is Responsible.

The need for a race-conscious legal remedy to be narrowly tailored to achieve its remedial purpose is generally recognized in prior decisions of this Court. In *Fullilove*, Justice Powell articulated the factors to be included in the analysis in the employment context as being:

(i) the efficacy of alternative remedies;
(ii) the planned duration of the remedy;
(iii) the relationship between the percentage of minority participation and minority availability;
(iv) availability of waiver provisions;
(v) the effect on innocent third parties. *Fullilove*, 448 U.S. at 510-11, 514.

Similar criteria were employed in *Paradise, supra* 107 S. Ct. 1053. In the context of this case another requirement should be added: identification of the problem to be remedied.

Identification of the Problem. Analysis of the correlation between remedy and problem is rendered difficult by the fact that there was no attempt to narrowly tailor the Plan. As Judge Wilkinson noted in dissent in

the original decision of the Court of Appeals,

> "Though factual findings alone do not ensure a "narrowly tailored" remedy, the absence of such findings makes it impossible to limit the remedy appropriately, for there is no evidence of the scope of past discrimination at which the program is aimed. A court can determine that the remedy substantially furthers its asserted purpose only if it is certain that the persons enacting the remedy know what it is that they intended to redress. J. S. Supp. App. E at 102-03.

The only intent evidenced by the record in this case was to adopt the same provision, without the underlying system of administration, which had been approved in *Fullilove*. J.A. at 15. The process which was followed excluded any careful attention to the scope of the problem. In fact, no particular race-based problem was identified. In this case an ordinance was drafted, a perfunctory hearing was held on short notice, the testimony at the hearing was ignored, a sponsor said he knew there was discrimination in the construction industry and announced that he had figures which showed that .67%[11] of prime contracts were awarded to minorities. The figures were neither given to any Council member nor otherwise made public. The only causes of the low representation to be identified were barriers to entry which were not race-related.

The Court of Appeals has correctly noted that the procedures followed in enacting the Richmond Ordi-

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[11] Appellee does not contest the .67% for purposes of this case, but does contend that there is nothing about the way the numbers were calculated or used that says anything about the fact of discrimination.

nance constitute the most casual deployment of race in the dispensation of public benefits. *Croson*, J. S. App. A at 14a. It is for this reason that the Court of Appeals concluded, "If this plan is supported by a compelling governmental interest, then so is every other plan that has been enacted in the past or that will be enacted in the future." *Id.* at 10a.

Correlation of Availability. Any correlation between the thirty percent figure and the actual capability of minority subcontractors and suppliers in the City of Richmond is purely accidental. "The figure simply emerged from the mists." *Id.* at 11a. The City made no determination of their capacity either to identify the scope of the alleged problem or determine how to address it. This is important because, as noted in *Fullilove*, 448 U.S. at 536, n. 7 (Stevens, J., dissenting) if the existing successful minority businesses expanded to perform the work, no remedial purpose would be achieved. More money would flow through minority businesses, as was stated by the sponsor when Richmond's Plan was introduced, but this is not a compelling interest.

Effect on Innocent Third Parties. This failure to consider the adequacy of the 30% requirement further serves to impose an unduly harsh competitive burden on non-minority contractors. As was observed by the Court of Appeals, subcontracting exactly thirty percent of a contract is often impossible. *Croson*, J. S. App. A at 11a. The case at issue is instructive; Croson would have had to subcontract seventy-five percent of the project in order to meet the thirty per cent quota.[12]

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[12] Normally the purchase of supplies by the general contractor would not be a subcontract, but the parties regarded this as an acceptable method of satisfying the 30% subcontract requirement. By contrast, Regulations of the Department of Transportation would allow the full amount of purchases from minority suppliers to satisfy

Failure to comply with the City's requirement that the fixtures be purchased from the supplier who was willing to supply them thus meant that the contractor was denied the ability to perform the work. The racial classification employed here meant that the regular supplier who submitted the low quote lost the order. Furthermore, the thirty percent set aside does not apply to minority prime contractors, which only serves to further disadvantage non-minority contractors. In other words, non-minority contractors are faced with submitting bids containing minority subcontractors' uncompetitive bids while minority contractors can seek competitive bids from non-minority subcontractors. The effect is not help to the poor or the disadvantaged but to transfer public monies anyone who happens to be one of the minorities selected for inclusion in the protected category. The resulting impact on third parties is too great in comparison to the benefit that might be gained by the set aside. No effort was made to include limiting provisions designed to assure that the plan would aid only those minorities who had been subjected to discrimination for which the City is responsible, see p. . . . , *supra*.

The City's plan is similarly overbroad in its definition of the minorities to be included. This Court in *Wygant* looked disfavorably upon an almost identical, overlybroad definition of minority. 476 U.S. at 284, n.13 (Powell, J.). "Because the layoff provision here acts to maintain levels of minority hiring that have no relation to remedying employment discrimination, it cannot be adjudged narrowly tailored . . ." *Id.* 476 U.S. at 266 (O'Connor, J.). Richmond City Council in adopting the

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minority participation goals only if the supplier performed a "commercially useful function" and is a "regular dealer." Participation of Minority Business Enterprise in Department of Transportation Programs, 49 CFR. Part 23, 52 Fed. Reg. 39, 227 (October 31, 1987).

plan did not give due consideration to either methods of identifying the particular minorities included in the definition or to whether in fact all of the groups had in fact been purposefully discriminated against in the past. Thus, the definition adopted impacts innocent third parties to such an extent that it is not narrowly tailored enough to achieve the objective of the plan.

Waiver and Duration. The Court of Appeals correctly noted that the plan's validity is not enhanced by the presence of the so-called waiver provision and the five-year duration. J. S. App. A at 13a.

Finally, both the waiver provision and the length of time during which the plan is to be effective are not closely enough fitted to the objective of the plan. The waiver provision is a waiver in name only, since it is only involved when no qualified minority is available. Not only is the waiver to be granted "only in exceptional circumstances," but the contractor is also shouldered with the burden of showing a lack of available minority participants, who may come in after the bids are opened.[13] The plan is to be effective for five years, and there is no limitation provided on City Council's ability to renew the plan indefinitely without reexaming the need for the race conscious plan. By contrast, the plan approved by this Court in *Fullilove* was limited to a four month period. The temporary nature of that plan compared with the long term nature of the Richmond plan demonstrates the objectionable length of the ordinance at issue.[14]

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[13] This was a finding of the District Court. *See* Note 2 *supra*.

[14] That minority participation programs are not short term remedies is seen in the legislative history of the Surface Transportation Act, P.L. 100-17, 101 Stat 132 which extended the minority participation program of the 1982 Surface Transportation Assistance Act, on grounds that while the programs have been helpful "barriers

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed and the case remanded to the District Court for determination of damages.

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Appellee

By /s/ WALTER H. RYLAND
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still remain. . ." 1987 U.S. Code Cong. & Admin. News 76. Women-owned businesses participate in that program. *Id.* at 78. The list of minorities who participate is taken from that which was adopted in 1978 and approved in *Fullilove*. *Id.* at 76.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF RICHMOND,

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF APPELLANT CITY OF RICHMOND

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REPLY BRIEF OF APPELLANT CITY OF RICHMOND

INTRODUCTION

Eliminating racial discrimination and its effects is a "fundamental policy" of our Nation,[1] and there is today no question that cities and states, as well as the federal government, have the power to implement this policy.[2] The exercise of this power is particularly important where racial discrimination has precluded or impaired

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[1] *Bob Jones Univ. v. United States*, 461 U.S. 574, 595 (1983).

[2] *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.); *id.* at 324-25 (opinion of Brennan, White, Marshall and Blackmun, J.J.).

minority access to commercial opportunities created by the government itself through its award of public contracts.

Appellee and its supporting *amici* would deny cities and states the power they need to remedy that racial discrimination. On the one hand, they would require legislatures to sit as courts, obligated to make judicial-like findings of discrimination in order to justify their remedial actions. On the other hand, they would require courts to sit as legislatures, deciding whether affirmative action plans are desirable as policy and reviewing all the details of the plans to determine whether they agree with the legislature about their potential effectiveness. This reflects a fundamental misunderstanding of the appropriate roles of the legislature and the courts in our system of government and demands from state and local legislatures far more than is necessary to ensure the responsible use of affirmative action to remedy past discrimination. Under any defensible level of scrutiny, and under any fair reading of this Court's precedents, the Richmond ordinance is constitutional.

In this reply, appellant City of Richmond responds to the primary points made by appellee and its *amici*. *First*, they argue that *Fullilove v. Klutznick*, 448 U.S. 448 (1980), does not apply to this case. Their attempts to distinguish *Fullilove* are unpersuasive; the principles established there are fully applicable to this case. *Second*, they characterize the factual predicate for the Richmond ordinance as "societal discrimination." That is incorrect. The Richmond ordinance is predicated on local construction industry discrimination that, as in *Fullilove*, has been sufficiently identified to support remedial action. *Third*, they attack the evidence of construction industry discrimination. Those attacks reflect a misunderstanding of the evidentiary issues in this case. *Fourth*, they argue that the Richmond ordinance places a great burden on non-minority contractors. This argument is at odds with

Fullilove, which establishes that the burden is acceptable. *Fifth*, they contend that Richmond was required to exhaust alternatives before resorting to an affirmative action plan. This requirement is unsupported by policy or precedent, and in any event Richmond did consider alternatives. *Finally*, they criticize the thirty percent minority subcontracting requirement as unreasonable and arbitrary. This criticism is unfounded. The thirty percent figure was reasonable in light of the virtual absence of minority participation in city contracts, as well as the waiver provision in the ordinance and the limited duration of the remedy.[3]

ARGUMENT

I. THE PRINCIPLES ESTABLISHED IN *FULLILOVE v. KLUTZNICK* ARE FULLY APPLICABLE TO THIS CASE

Fullilove v. Klutznick established that there is a compelling governmental interest in creating for minority businesses opportunities in public contracting that had been impaired or foreclosed by the effects of past discrimination.[4] More particularly, *Fullilove* upheld the use of a race-conscious set-aside plan upon evidence that minority-owned businesses were receiving only a negligible portion of public construction contracts as a result of racial discrimination in the construction industry. The

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[3] Appellee also contends that the ordinance was inflexibly and unfairly applied to it. Brief of Appellee at 3. The district court decided this issue in the City's favor after hearing testimony and taking other evidence. *See* J.S. Supp. App. 209-15. It explicitly found that a minority business enterprise, Continental, was available to perform on the contract and was not taking advantage of the ordinance to charge excessive prices. J.S. Supp. App. 231, n.20. The court concluded that the City's decision to deny appellee's waiver request and re-bid the contract "was not only reasonable, but appears to have been absolutely correct." *Id.*

[4] 448 U.S. at 475-78; *id.* at 508, 515 (Powell, J., concurring).

attempts of appellee and its *amici* to limit the clear precedential value of *Fullilove* are strained and unpersuasive.

They contend that *Fullilove* concerned only the power of Congress and has no application to states or localities.[5] Although Chief Justice Burger did state that no organ of government has more comprehensive remedial powers than Congress, 448 U.S. at 483 (plurality opinion), nothing in *Fullilove* indicates that only Congress may remedy the effects of discrimination on public contracting. The focus on congressional power served two purposes, neither of which confines the principles established in *Fullilove* to federal affirmative action programs.

First, the discussion of congressional power was necessary because the Court could not uphold the federal set-aside unless it found that Congress was exercising some authority granted to it under the Constitution. 448 U.S. at 473-80 (plurality opinion). A similar constitutional analysis is unnecessary here, because state and local governments have the authority to remedy discrimination pursuant to their police powers, subject to the restraints of state law and the Fourteenth Amendment.[6] The district court found that Richmond's City Council had the authority under state law to enact its ordinance,[7] and the court of appeals did not disturb this finding.

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[5] *See, e.g.*, Brief for the United States as *Amicus Curiae* Supporting Appellee at 27-28 (hereinafter "Brief for the United States").

[6] *See, e.g., Southwest Washington Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County*, 100 Wash. 2d 109, 123, 667 P.2d 1092, 1099 (1983) (en banc); *Hutchinson Human Relations Comm'n v. Midland Credit Mgmt., Inc.*, 213 Kan. 308, 311-12, 517 P.2d 158, 162 (1973). Indeed, remedying identified discrimination in local industries is a problem more amenable to solutions at the state and local level than at the federal level. *See* Brief of the National League of Cities et al. as *Amici Curiae* in Support of Appellant at 10-14.

[7] J.S. Supp. App. 141-154.

The second reason for the discussion of congressional power in *Fullilove* was to emphasize that because Congress is a legislative body, its remedial powers are broader than those of courts and other non-legislative bodies. Chief Justice Burger stated: "Here we are not dealing with a remedial decree of a court but with the legislative authority of Congress." 448 U.S. at 480 (plurality opinion). Of course, a national legislature necessarily has more comprehensive remedial powers than a local one, in the sense that only it may legislate on a national scale. But a local legislature is still a legislature; like Congress, its role is "to make policy rather than to apply settled principles of law." [8] Where, as here, a local legislature has acted to remedy the effects of local construction industry discrimination on its own public works program, *Fullilove* provides a highly relevant precedent for such action.

The United States also suggests that *Fullilove* is inapposite here because there are greater equal protection constraints on state and local governments than on the federal government.[9] This argument directly contradicts the well-established principle that the reach of the equal protection guarantee of the Fifth Amendment is co-

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[8] *Fullilove*, 448 U.S. at 502 (Powell, J., concurring). *See also Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221 n.10 (1974) ("The legislative function is inherently general rather than particular").

[9] *See* Brief for the United States at 27-28. The United States argues that "overriding national interests" allow Congress to enact remedial race-preferential legislation that would be impermissible as state or local enactments, citing *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). *Hampton* is inapplicable here because it involved the authority to control immigration, which is "vested solely in the Federal Government, rather than the States." *Hampton*, 426 U.S. at 101 n.21. In contrast, state and local governments have "a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." *Bakke*, 438 U.S. at 307 (opinion of Powell, J.). *See also Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984).

extensive with that of the Fourteenth.[10] The Court has found no reason to hold the states to a higher constitutional standard than the federal government.[11]

In fact, the *Fullilove* plurality led by Chief Justice Burger held the federal government to a very high standard. It stressed that while reviewing an act of Congress is a "delicate duty," [12] "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." 448 U.S. at 491. It explicitly stated that the federal plan survived even the strictest standard of judicial review articulated in *Bakke*. *Id.* at 492. Justice Powell wrote separately in *Fullilove* to emphasize that the federal set-aside plan was constitutional "under the most stringent level of review." *Id.* at 496 (Powell, J., concurring).[13]

Finally, the United States attempts to limit *Fullilove* on the ground that it involved only a facial challenge to the federal plan. It argues that *Fullilove* left open the question of whether an affirmative action plan may be applied to those who are not shown to be actual victims

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[10] *See, e.g., San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 107 S. Ct. 2971, 2984 n.21 (1987); *United States v. Paradise*, 107 S. Ct. 1053, 1064 n.16 (1987) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

[11] *Bolling v. Sharpe*, 347 U.S. at 500.

[12] 448 U.S. at 472 (plurality opinion) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)).

[13] While the Minority Business Utilization Plan also survives strict scrutiny, appellant submits that an intermediate level of scrutiny is more appropriate for race-conscious remedial legislation. *See* Brief of Appellant at 17-18. *See also* Brief *Amicus Curiae* of the American Civil Liberties Union et al. in Support of Appellant at 6-17.

of discrimination. Brief for the United States at 26. However, the Court since has answered this question in the affirmative. In the *Sheet Metal Workers* case, six members of the Court agreed that race-conscious relief may benefit individuals who are not the actual victims of discrimination.[14] As Justice O'Connor observed in *Wygant v. Jackson Board of Education*, the Court "is agreed that a plan [for affirmative action] need not be limited to the remedying of specific instances of identified discrimination . . ." [15]

II. RICHMOND HAS A COMPELLING INTEREST IN ITS REMEDIAL ORDINANCE

A. Local Industry Discrimination Is Not "Societal Discrimination" And Provides A Proper Predicate For Richmond's Remedial Ordinance

As Richmond argued in its opening brief to this Court, the City was not required to present evidence of its own discrimination in order to justify its remedial ordinance. *See* Brief of Appellant at 33-38. Although appellee and some of its *amici* have disagreed with this position, they have offered no principled reason that a city may remedy only its own discrimination. The United States has agreed with Richmond that "it is permissible for a state or local government, in appropriate circumstances, to seek to remedy unlawful discrimination by others." [16]

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[14] *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3034, 3054 (1986) (plurality opinion); *id.* at 3054 (Powell, J., concurring); *id.* at 3062 (White, J., dissenting).

[15] *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 287 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

[16] Brief for the United States at 13. *See also* Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law et al. in Support of the Appellant at 8-13 (arguing that limiting states and localities to remedying identified discrimination reflects a balance of competing interests, and that further limiting them to remedying only their own discrimination is unnecessary and upsets this balance).

The central issue is not whether the City perpetrated the discrimination supporting its remedial ordinance, but whether, as the United States argues, that discrimination is so amorphous as to constitute an inadequate basis for remedial action. In other words, assuming that "societal discrimination" alone does not constitute an adequate predicate for a government's affirmative action plan,[17] the question is whether the discrimination in Richmond's local construction industry constitutes "societal discrimination." Based on *Fullilove* and other precedents of this Court, the answer must be no.

While this Court has never actually defined the term "societal discrimination," its meaning is discernible. As the United States points out,[18] the term has been featured most prominently in the opinions authored by Justice Powell. In *Bakke*, Justice Powell characterized "societal discrimination" as "an amorphous concept of injury that may be ageless in its reach into the past." 438 U.S. at 307. Permitting it to serve as a basis for remedial action, he stated, would turn the affirmative action remedy "into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination." *Id.* at 310. In *Wygant*, Justice Powell continued in this vein. He stated: "No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over-expansive." 476 U.S. at 276 (plurality opinion) (emphasis in original).

Indeed, all discrimination that has occurred in our society could be said to be part of societal discrimination.

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[17] A plurality of this Court so stated in *Wygant*, 476 U.S. at 276, but the question has not been decided by a majority of the Court.

[18] *See* Brief for the United States at 15.

Only when it is "identified" does it become something more. *See Fullilove*, 448 U.S. at 497 (Powell, J., concurring). In other words, societal discrimination simply means discrimination that has not been identified with any degree of particularity. As *Fullilove* makes clear, an identified pattern of discrimination in a particular industry does not constitute societal discrimination.[19]

Like Congress, the Richmond City Council did not predicate its legislation on general discrimination within our society and leave it at that. It had ample evidence of actual discrimination in its local construction industry. *See infra* at 10-14. The discrimination that the City identified was not a collection of "discrete and isolated decisions,"[20] but a pattern of intentional behavior designed to ensure whites a superior position in the industry. There is nothing amorphous about the systematic exclusion of blacks from the construction trades,[21] or the

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[19] Justice Powell did not consider the discrimination at issue in *Fullilove* to be "societal." He explicitly upheld the federal plan as a remedy for "the continuing effects of past discrimination identified by Congress." 448 U.S. at 496 (footnote omitted). He also recognized that the discriminatory activities could not be expected to be "identified with the exactitude expected in judicial or administrative adjudication." *Id.* at 506. *See also* Note, *The Non-Perpetuation of Discrimination in Public Contracting: A Justification for State and Local Minority Business Set-Asides After Wygant*, 101 Harv. L. Rev. 1797, 1805-06 (1988).

[20] Brief for the United States at 17.

[21] "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 198 n.1 (1979). Congress found that the exclusion of minorities from the construction trades had prevented them from gaining experience in the construction industry. *See Fullilove*, 448 U.S. at 511-12 (Powell, J., concurring). *See also* Brief of the Minority Business Enterprise Legal Defense and Education Fund et al. as *Amici Curiae* in Support of Appellant at 10-12 ("Pervasive employment discrimination in the construction trades has prevented minorities from following the traditional path from laborer to entrepreneur").

purposeful maintenance of a "business system which has traditionally excluded measurable minority participation." [22] The effects of this discrimination, the virtual absence of blacks from city contracting and from Richmond's major construction trade associations—the mainstream of the construction industry—are also quite concrete, as is the City's role in perpetuating those effects through its award of city contracts.

In short, the City was not trying to remedy discrimination in society generally, but was addressing the specific problem of discrimination in a local industry and its effects on the City's own public works program. The discrimination that it sought to remedy was no less "identified" than that supporting the federal plan in *Fullilove*. A city must be permitted to take remedial action in such circumstances.

B. Richmond Had Sufficient Evidence Of Local Construction Industry Discrimination To Support Its Remedial Ordinance

Appellee and supporting *amici* spend a substantial portion of their briefs attempting to pick apart the evidence of construction industry discrimination supporting the Richmond ordinance.[23] In so doing, they reveal their misunderstanding of the evidentiary issues in this case.

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[22] H.R. Rep. No. 1791, 94th Cong., 2d Sess. 182 (1977) (quoted in *Fullilove*, 448 U.S. at 466 n.48 (plurality opinion) and at 505 (Powell, J., concurring)).

[23] Appellee suggests that the idea that the Richmond ordinance was a remedy for construction industry discrimination is being raised now for the first time. *See* Brief of Appellee at 10 n.3, 12. This is untrue. The district court explicitly upheld the ordinance as a remedy for the "present adverse effects of past discrimination in the construction industry." J.S. Supp. App. 163. In addition, the City Attorney stated at the City Council hearing that the City was relying on a Supreme Court decision (*Fullilove*) that had permitted remedial legislation based on industry discrimination. J.A. 15. The City's briefs in the lower courts also refer to industry discrimination. *See, e.g.*, Defendant's Brief in Support of Motion for Partial Summary Judgment at 32, 34.

The central evidentiary question is not whether there has been a factual finding of discrimination of the sort necessary to prevail on a discrimination claim, but whether the City had "sufficient evidence to justify the conclusion that there has been prior discrimination." [24] This evidentiary requirement reflects the well-settled principle that legislatures, whether they be local, state or federal, are not expected to act like courts. In reviewing the sufficiency of the evidence of discrimination in *Fullilove*, for example, this Court stressed that "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." [25]

The "sufficient evidence" requirement should be applied in light of its purpose, which is to ensure that an affirmative action plan that purports to be remedial is in fact a response to discrimination, rather than an attempt to use racial classifications to achieve racial balance for its own sake or for some other impermissible purpose. Accordingly, a government need only have evidence of discrimination sufficient to ensure that its plan is truly remedial and need not prove specific acts of discrimination. The evidence supporting Richmond's ordinance easily satisfies this test.

Appellant has never contended that any one fact conclusively proves that there has been discrimination in

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[24] *Wygant*, 476 U.S. at 277 (plurality opinion). *See also id.* ("a strong basis in evidence" is needed); *id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment) (government needs "firm basis to believe that remedial action is required").

[25] 448 U.S. at 478 (plurality opinion). *See also id.* at 502 (Powell, J., concurring) ("Congress is not expected to act as though it were duty bound to find facts and make conclusions of law"). *See also* Brief of the States of New York et al. as *Amici Curiae* in Support of Appellant at 7; Brief of the Maryland Legislative Black Caucus as *Amicus Curiae* in Support of Appellant at 21-28.

Richmond's local construction industry. Conceivably, the fact that a city half black had been awarding more than 99 percent of its construction contracts to white-owned contractors could be due to other causes.[26] Similarly, the fact that Richmond's chapter of the Associated General Contractors counted *no* blacks among its 130 members, and the fact that other major trade associations also had very few or no black members, may not by themselves necessarily reflect industry discrimination. It is also theoretically possible that the well-known and well-documented history of discrimination in the nation's construction industry[27] somehow has not infected Richmond.

When these facts are viewed as a whole, however, the conclusion that there has been racial discrimination in Richmond's local construction industry is unavoidable. The City Council did not enact the Minority Business Utilization Plan based on speculation or assumptions about past discrimination. It was familiar with the his-

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[26] This is not, however, because the statistic does not reflect the number of city contracting dollars reaching minority firms through subcontracts, as appellee suggests. *See* Brief of Appellee at 13. As the district court found, *see* J.S. Supp. App. 167-69, there is no reason to believe that minority firms were faring much better on subcontracts.

Appellee's statement that white prime contractors in fact were making significant use of minority subcontractors is misleading. Brief of Appellee at 8. Richmond's City Manager did state at the public hearing that overall minority participation in city contracts was 7 or 8 percent, but he was referring to all city contracts, not construction contracts. J.A. 16. Similarly, this Court should give no weight to appellee's reference to unidentified documents not in the record of the case that it claims show that minority firms were awarded 10.5 percent of the City's construction purchase orders (under $10,000) during an unspecified time period. Brief of Appellee at 10 n.3. Even if the represented fact were in the record, it is irrelevant since it would not change the fact that minority firms were receiving less than one percent of the more valuable city construction contracts.

[27] *See* Brief of Appellant at 23-25 & n.38.

tory of race relations in Richmond generally and with the local construction industry in particular. The City Council knew that discrimination in the local construction industry substantially had foreclosed minority access to city construction contracts. While the need for judicial review of race-conscious legislative action is clear, a legislature's view of facts should be upheld if it is so obviously reasonable and supported by the record.[28]

Appellee also fails to recognize that the critical stage for establishing an affirmative action plan's factual predicate is when the plan is challenged in court;[29] appellee erroneously treats the City Council's hearing as though it were the entire record in the case.[30] Moreover, appellee does not appreciate that it bears the burden of proof in challenging Richmond's remedial plan. Although the government must present evidence of discrimination to support its plan, it does not bear the ultimate burden of persuasion: "[I]t is incumbent upon the non-minority [plaintiffs] to prove their case; they continue to bear the ultimate burden of persuading the court that the [government's] evidence did not support an inference of prior discrimination and thus a remedial purpose." [31]

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[28] *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981) (courts should not "substitute their evaluation of legislative facts for that of the legislature").

[29] *Wygant*, 476 U.S. at 277 (plurality opinion). *See also id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment).

[30] Appellee ignores the fact that the City Council's public hearing was just the final step in the process by which the Minority Business Utilization Plan became law. For example, it incorrectly suggests that prior to the hearing the City Council members had no statistics on minority participation in city construction contracts. Brief of Appellee at 8. In fact, prior to the public hearing council members were well aware of the negligible number of contracts awarded to minority firms and were involved in developing the remedial plan with the City Attorney. J.A. 26-27.

[31] *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment). *See also id.* at 277-78 (plurality

One *amici* group also would like to rewrite the facts of this case. The Washington Legal Foundation and the Lincoln Institute have questioned the previously undisputed fact that the number of minority contractors in Richmond is "quite small." J.S. App. 7a. They have attempted to introduce into the record statistics of the United States Census Bureau indicating that in 1982 there were 144 black-owned construction firms in Richmond.[32] They fail to mention, however, that the same statistical table from the Census Bureau survey indicates that only 30 of those 144 "firms" had paid employees, and that the gross annual sales and receipts of the 144 firms totaled only $3.3 million, or less than $24,000 per "firm." Even the 30 firms with paid employees had only 77 employees among them and averaged gross receipts of only $70,000 annually.[33] The Census Bureau information thus tends to confirm what the City has known all along: that there are minority-owned construction firms in Richmond, but that most are small, struggling operations that are outside the mainstream of the local construction industry and have been precluded from competing with more established firms for city contracts.[34]

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opinion); *Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442, 1449 (1987).

[32] Brief of *Amici Curiae* the Washington Legal Foundation and the Lincoln Institute for Research and Education at 9-10 (hereinafter "Brief of the Washington Legal Foundation").

[33] U.S. Bureau of the Census, *1982 Survey of Minority-Owned Business Enterprises: Black* at 88 (1985).

[34] The Washington Legal Foundation and the Lincoln Institute also suggest that the fact that minority businesses received only .67 percent of the value of city construction contracts is misleading because minority firms might have received a large number of small contracts, while white-owned firms received a few large contracts that would skew the statistics. *See* Brief of the Washington Legal Foundation at 15. They are incorrect. Had they reviewed the list of the $124 million in construction contracts that Richmond awarded between 1978 and early 1983, which is part of the record

III. THE RICHMOND ORDINANCE IS NARROWLY TAILORED TO ACHIEVE ITS REMEDIAL PURPOSE

A. The Ordinance Does Not Unnecessarily Burden Third Parties

Appellee and its *amici* claim that the ordinance unduly burdens non-minority contractors. Their argument is inconsistent with this Court's precedents.[35] White contractors are not like the white teachers laid off in *Wygant*, or the white firefighters discharged in the *Stotts* case.[36] They do not have a legitimate proprietary interest in receiving any particular public contract, or for that matter, in maintaining their existing market share of

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in this case, they would have known that there were 215 contracts awarded, that 14 were for more than $1 million, and that these 14 contracts accounted for approximately $65 million of the $124 million total, or approximately half. *See* Def. Ex. D. This means that even if contracts over $1 million are not considered, minority firms still received well under two percent of the City's construction contracts.

Amici Washington Legal Foundation and Lincoln Institute also state that it is their "understanding that the current experience under the Richmond plan is that in order to satisfy the 30 percent set-aside provision, there is extensive use of minority firms located in Atlanta and Philadelphia." Brief of the Washington Legal Foundation at 22. Not only is this not in the record, it is erroneous.

[35] To support its argument that the ordinance "impose[s] an unduly harsh competitive burden on non-minority contractors," appellee states that it was denied the ability to perform the work on the public contract on which it had bid because of the City's subcontracting requirement. Brief of Appellee at 28-29. This ignores the fact that appellee simply could have re-bid on the contract. *See supra* note 3. In addition, it conflicts with this Court's recognition that "[a]s part of this Nation's dedication to eradicating racial discrimination . . . innocent persons may be called upon to bear some of the burden of [a race conscious] remedy." *Wygant*, 476 U.S. at 280-81 (plurality opinion).

[36] *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

public contracts. Thus, the ordinance "unsettle[s] no legitimate firmly rooted expectation[s]." [37]

In addition, the ordinance does not single out any individual non-minority contractor. The impact of the ordinance is "limited and so widely dispersed that its use is consistent with fundamental fairness." *Fullilove*, 448 U.S. at 515 (Powell, J., concurring). In fact, the *Wygant* plurality contrasted the indirect "light burden" imposed on white contractors by the comparable minority set-aside requirement in *Fullilove* with the heavy burden of the layoffs that fell directly on white teachers in *Wygant*. 476 U.S. at 282-83.[38]

B. Richmond Selected A Reasonable Means Of Attaining Its Remedial Goal

The United States contends that before resorting to the ordinance the City was required to show that "non-race-specific remedies ha[d] been or clearly would [have] been unavailing," and that such alternatives were in fact available to the City. Brief for the United States at 21. It is wrong on both counts.[39]

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[37] *Johnson*, 107 S. Ct. at 1455.

[38] The United States' argument that the ordinance "may require the layoff of innocent workers" is strained. Brief for the United States at 23. It offers no reason to believe that the ordinance will in fact have such a direct impact on non-minorities.

[39] The United States' suggestion that the availability of alternatives is the "critical factor" in the "narrowly tailored" analysis also is unsupported. Brief for the United States at 21. If one factor has been the most telling, it is not the availability of alternatives, but the impact of race-conscious relief on third parties. Indeed, this proved to be the dispositive factor in the only two decisions of this Court during this decade striking down affirmative action plans. *See Wygant*, 476 U.S. at 278, 283-84 (plurality opinion); *id.* at 294 (White, J., concurring); *Stotts*, 467 U.S. at 574-76, 578-79. *See also Paradise*, 107 S. Ct. at 1076 (Powell, J., concurring) ("particularly important" that the race-conscious measure did not unduly burden innocent whites).

The United States' proposed requirement would strip the City of any discretion in selecting an appropriate remedy for identified discrimination. Even under strict scrutiny, this Court has not "in all situations 'required remedial plans to be limited to the least restrictive means of implementation. . . .'" *Paradise*, 107 S. Ct. at 1073 (plurality opinion) (quoting *Fullilove*, 448 U.S. at 508 (Powell, J., concurring)). Instead, the question of alternative remedies is viewed in conjunction with the other factors that comprise the narrowly tailored test. Furthermore, the availability of alternatives bears on the question of whether the means actually employed were "necessary." *See Paradise*, 107 S. Ct. at 1067 (plurality opinion). Therefore, although "less intrusive means might serve the ends, [the] choice of remedy should be upheld . . . if the means selected are equitable and reasonably necessary to the redress of identified discrimination." *Fullilove*, 448 U.S. at 510 (Powell, J., concurring).

Richmond's ordinance not only has a minimal impact on third parties, *see supra* at 15-16, but it is a reasonable means of remedying the identified problem. The problem the City faced was that minority contractors had been excluded from the mainstream of the construction industry and were not participating in public contracting. The ordinance was designed to team up minority firms as subcontractors with established white-owned firms. This served to remove some of the practical obstacles that had kept minority firms out of public contracting, such as access to financing. It also was designed to give minority businesses experience in public contracting, which would familiarize them with the contracting system and provide them with an opportunity to develop a track record.[40] This approach was particularly appropriate because "the subcontracting system offers entrepreneurs a training

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[40] *See* R. Glover, *Minority Enterprise in Construction* 73 (1977) ("a contractor can build his business through public work").

ground in which to develop the skills necessary to become a successful contractor." [41]

The City did consider alternatives. Based on its past experience, however, the City determined that these measures either had not been or would not be efficacious. Prior to enacting the ordinance, the City had passed legislation banning discrimination in its public contracting.[42] In addition, as the district court found, minority businesses had been receiving different kinds of federal, state and local assistance, but "continued to participate in miniscule proportion as prime contractors in the City's construction contracts. . . ." J.S. Supp. App. 193. The district court determined that the City was aware of "other governmental efforts at various levels to promote minority business development," but considered a minority subcontracting requirement to be the most appropriate means to address its problem. *Id.* at 194.

C. The Thirty Percent Minority Subcontracting Requirement Is Flexible And Reasonable

Appellee and its *amici* criticize the thirty percent subcontracting requirement as arbitrary and unreasonable. Their criticism is unfounded. The thirty percent figure "necessarily involve[d] a degree of approximation and imprecision." [43] However, it would not have been sensible for the City to tie the subcontracting requirement to the

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[41] U.S. Civil Rights Commission, *Selected Affirmative Action Topics in Employment and Business Set-Asides*, Vol. 1, at 90 (1985) (testimony of John W. Sroka, Executive Director, Occupational Divisions of the Associated General Contractors of America).

[42] Human Rights, Richmond, Va. Code § 17.2 (1975) (attached as Appendix No. 2 to Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law et al.). This ordinance banned both discrimination in the award of public contracts and employment discrimination by public contractors.

[43] *Paradise*, 107 S. Ct. at 1072 (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 372 (1977)).

number of minority contractors in Richmond, as the United States argues,[44] since that number was artificially low because of discrimination. J.S. Supp. App. 167. It was reasonable for the City to conclude that some greater number of minorities should and would have participated in public contracts but for industry discrimination.[45] The thirty percent figure represents a "halfway" mark between the minority population of Richmond and the existing number of minority contractors doing business with the City, and thus parallels the approach adopted by Congress and upheld by this Court in *Fullilove*. 448 U.S. at 513-14 (Powell, J., concurring).

Furthermore, the thirty percent subcontracting requirement is not rigid. The inclusion of a provision permitting the requirement to be lowered or waived indicates that the thirty percent figure "contains significant elements of flexibility . . . ." *Paradise*, 107 S. Ct. at 1076 (Powell, J., concurring). In addition, the limited duration of the subcontracting requirement enhances its reasonableness.

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[44] Brief for the United States at 22.

[45] The United States attacks the ordinance as overbroad because it includes groups such as Aleuts and Eskimos as eligible minorities. Brief for the United States at 22. This point is irrelevant as a practical matter, however, since such groups are highly unlikely actually to benefit from the plan.

CONCLUSION

For the reasons stated herein and in appellant's opening brief, this Court should reverse the decision of the court of appeals and uphold the constitutionality of Richmond's Minority Business Utilization Plan.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND, APPELLANT

v.

J.A. CROSON COMPANY

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE

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QUESTION PRESENTED

Whether the Richmond city ordinance, which requires every nonminority prime construction contractor to subcontract at least 30% of the value of its city contracts to minority business enterprises, violates the Equal Protection Clause of the Fourteenth Amendment.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE

INTEREST OF THE UNITED STATES

The United States is responsible for enforcing numerous statutes prohibiting discrimination on the basis of race or national origin (see, *e.g.*, 42 U.S.C. 2000e-5(f)(1)), and may intervene in cases brought under the Fourteenth Amendment (see, *e.g.*, 42 U.S.C. 2000h-2). The United States has in the past participated both as a party and as an amicus curiae in cases presenting constitutional claims of race discrimination. See, *e.g.*, *Regents of the Univ. of California* v. *Bakke*, 438 U.S. 265 (1978); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986). The Court recently invited the Solicitor General to present the views of the United States in another case involving a constitutional challenge to a minority business enterprise program. See *H.K. Porter Co.* v. *Metropolitan Dade County*, No. 87-1001.

STATEMENT

1. Appellant, the City of Richmond, Virginia, has a population that is over 50% minority, of which blacks are by far the

largest group (J.A. 12, 29; J.S. Supp. App. 207). In early 1983, appellant released a study indicating that, notwithstanding this heavy minority population, only two-thirds of one percent—0.67%—of the value of the city's construction contracts had been awarded or subcontracted to minority-owned businesses in the previous five years (J.A. 41, 43). In light of this study, appellant's City Council was asked to adopt an ordinance requiring that 30% of its construction expenditures over the next five years be set aside for minority business enterprises (MBEs) (J.A. 11; J.S. App. 2a).

On April 11, 1983, the City Council held a public hearing concerning this proposed ordinance (J.A. 11). Proponents of the ordinance argued that the city had "not reached a successful or an admirable goal in terms of minority participation" in public construction contracting (*ibid.*); that there was "evidence of general discrimination—at least discriminatory effect in the entire industry—construction industry" (J.A. 15, 41); that local construction industry organizations in the city and state had few, if any, black members (J.A. 27-28, 34-35, 36-37, 39-40); and that, in a similar context, Congress enacted, and this Court upheld, a federal set-aside program for minority-owned businesses (J.A. 24, 25). Opponents of the ordinance argued that it would result in reduced competition and higher public construction costs (J.A. 19-21); that it would violate both Virginia law and the federal Constitution (J.A. 22-23); that the trade associations to which the proponents of the ordinance referred had not engaged in prior race discrimination (J.A. 20, 39); that comparisons between the percentage of minorities in the city's population and the percentage of minority businesses receiving public construction funds were not probative of prior discrimination by either the city or the construction industry (J.A. 30); and that, since only 4.7% of the construction firms in the country are minority owned, minority owned subcontractors were not available or qualified in sufficient numbers to allow prime contractors to satisfy the 30% MBE participation requirement (J.A. 32-36). At the close of the hearing, the nine-member City Council adopted the ordinance by a 6-2-1 vote (J.A. 49).

As adopted, the ordinance provides that "[a]ll contractors awarded construction contracts by the City shall subcontract at least thirty per cent of the contract to minority business enterprises" (J.S. Supp. App. 247). The ordinance defines an MBE to be a "business at least fifty-one per cent of which" is owned by "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts" (*id.* at 241-242 (italics deleted)). It allows the 30% MBE goal to be relaxed only "where a contractor can prove to the satisfaction of the director [of the city's Department of General Services] that the requirements herein cannot be achieved" (*id.* at 247). And it characterizes itself as "remedial and * * * [as being] enacted for the purpose o[f] promoting wider participation by minority business enterprises in the construction of public projects, either as general contractors or subcontractors" (*id.* at 248). By its terms, the ordinance expires on June 30, 1988 (*ibid.*).

2. In September 1983, appellant invited bids for the installation of stainless steel urinals and water closets in its jail (J.S. App. 2a). Appellee, J.A. Croson Company, a non-MBE plumbing and heating contractor based in Ohio, was the only bidder on the contract (*id.* at 2a-3a; J.S. Supp. App. 119-120). In preparing its bid, appellee attempted to subcontract 30% of the value of the contract to MBEs (*id.* at 120-124). But only one MBE was interested in participating and that MBE was unable to provide a timely price quotation (*id.* at 124). Appellee therefore submitted its bid without achieving the requisite 30% MBE participation and, instead, requested that appellant waive the MBE goal for this contract (J.S. App. 3a).

When the untimely minority subcontractor learned of appellee's request for a waiver, however, it notified appellant that it could in fact provide the plumbing fixtures required by the contract's specifications (J.S. Supp. App. 125). Appellant accordingly denied the requested waiver and directed appellee to submit a revised bid form (*id.* at 125-126). Appellee elected not to do so (J.S. App. 3a). Instead, it renewed its request for a waiver, arguing that, if it were required to use this minority sub-

contractor, the cost of the project would rise by $7,663.16 and its bid would have to rise along with it (*ibid.*). But appellant turned appellee down again, stating that the minority subcontractor was qualified and that the bid could not be increased (*ibid.*). Appellant subsequently decided to rebid the contract (*ibid.*).

3. Shortly thereafter, appellee instituted this action for monetary and injunctive relief under 42 U.S.C. 1981 and 1983,[1] arguing that the 30% MBE participation requirement violated both Virginia competitive bidding law and the Equal Protection Clause of the Constitution (J.S. App. 3a; J.S. Supp. App. 4, 112-114). On the parties' cross-motions for summary judgment, the district court ruled that the ordinance was consistent with both Virginia and federal law (*id.* at 112-232). On appeal, a divided panel of the Fourth Circuit affirmed (*id.* at 1-109). On petition for a writ of certiorari, however, this Court vacated the Fourth Circuit's judgment and remanded for further consideration in light of *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (J.S. App. 3a).

4. On reconsideration, a divided panel of the Fourth Circuit reversed and remanded (J.S. App. 1a-26a). It found (*id.* at 4a) that "[t]he very infirmities which marked the preferential provision in *Wygant* are present in this case."

First, the court determined (J.S. App. 6a-9a) that appellant had not established the predicate of prior discrimination by the city that the court said is necessary for justifying a preference program as being remedial in nature. It noted that "[t]he debate, at the very end of a five-hour council meeting, revealed no record of prior discrimination by the city in awarding public contracts, aside from some conclusory and highly general statements * * *" (*id.* at 6a). It added that "[t]he only other evidence purporting to show discrimination in the assignment of contracts [was the statistics] compar[ing] the percentage of minority contracts with the total number of minority residents

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[1] Appellee originally brought the action in the Circuit Court of the City of Richmond, but appellant later removed it to federal district court. See J.S. Supp. App. 113. The court then consolidated the action with another suit against appellant. See *id.* at 129-138.

in the community" (*ibid.*); but it found that such "[g]eneral population statistics suggest, if anything, more of a political than a remedial basis for the racial preference," and that, after *Wygant*, "this is exactly the kind of evidence that will not pass muster" (*id.* at 6a-7a). And it stated (*id.* at 8a-9a) that, if appellant "thought it was permissible simply to adopt the contract set-aside program upheld by [this] Court in *Fullilove* v. *Klutznick*, 448 U.S. 448 * * * (1980)," "it was in error" to do so, since "[n]ational findings do not alone establish the need for action in a particular locality."

Second, the court found (J.S. App. 11a) that, even if the ordinance had a proper remedial predicate, it was "not narrowly tailored to that remedial goal," as required by *Wygant*. The court determined (*ibid.*) that "[t]he thirty percent goal was chosen arbitrarily," noting that "it was not tied * * * to a showing that thirty percent of Richmond subcontractors are minority-owned." It further found (*ibid.*) that "[t]he competitive disadvantage is far greater than the thirty percent minimum set-aside suggests," since, "[i]n many construction contracts, the dollar allocation among subcontractors will not break into a thirty percent block," and, in such situations, the ordinance will " 'unnecessarily trammel the rights of innocent individuals directly and adversely affected by the plan's racial preference' " (*ibid.* (citation omitted)). In addition, it found (*id.* at 12a) that "the definition of minority-owned business is itself not narrowly tailored to the remedying of past discrimination," noting that the definition in the ordinance "nearly duplicates the definition that drew fire in *Wygant*" (*ibid.*), and stating that "[a] record of prior discrimination against blacks by a governmental unit would not justify a remedial plan that also favors other minority races" (*ibid.*). Finally, it found (*id.* at 12a-13a) that, while "the presence of an expiration date and a waiver provision may help to narrow the scope of a plan's operation," "[w]hether the Richmond plan will be retired or renewed in 1988 is * * * nothing more than speculation" and "the waiver here [does not] cure the constitutional defects defined by the *Wygant* decisions," since a waiver "is to be granted 'only in exceptional circumstances' and as a matter of administrative discretion."

SUMMARY OF ARGUMENT

A. The ordinance at issue classifies on the basis of race and is therefore constitutionally suspect. The Court has, however, yet to reach a consensus on the appropriate constitutional analysis where race is used for remedial purposes. We believe that the Court should now hold that the standard of review applicable to remedial uses of race is the same as the standard of review applicable to non-remedial uses of such criteria—*i.e.*, that the racial classification must be "narrowly tailored" to achieve a "compelling" governmental interest. The Equal Protection Clause is a guarantee of equality to all individuals. Accordingly, the standard of justification for a racial classification should remain constant, regardless of the identity of the plaintiff or the articulated purpose of the classification.

B. This ordinance does not serve a compelling governmental interest. The ordinance's asserted interest in increasing MBE participation in local public construction projects is not, standing apart from any historical predicate justifying race consciousness, a legitimate governmental interest at all, much less a compelling one. Nor can the ordinance be justified as a remedy for prior discriminatory actions. While a state or local government has a compelling interest in remedying the effects of its own past and present discrimination, there is no basis for finding that appellant has engaged in any such discrimination; indeed, appellant does not even claim that such evidence exists. Moreover, while a state or local government has a compelling interest in remedying the effects of identified unlawful actions by private parties, appellant has not identified any such illegal acts of discrimination. It has at most identified race-neutral conditions perpetuating the effects of past discrimination. Accordingly, the ordinance cannot be justified as a remedy for unlawful discrimination by others in the local construction industry.

Even if appellant's ordinance could be justified by reference to unidentified acts of discrimination in the local construction industry, it would still fail for lack of narrow tailoring. Appellant has never attempted to address the problem of low minority participation—whatever its causes may be—by race-

neutral means. Appellant might have considered revising its bidding practices, adopting special advertising and outreach programs, authorizing special public financing, or providing training and certification for potential entrants to the industry. But it has not done so. Instead, it adopted a 30% set-aside that bears no relation to the percentage of qualified minority group members in the relevant pool of those able to participate as subcontractors. Its action imposes substantial burdens on nonminority contractors for a five-year period. Concomitantly, it does not provide adequate mechanisms to relieve nonminority contractors of the program's harsh effects, to relieve contractors with no history of discrimination of the program's requirements, or to disqualify MBEs that are not suffering the effects of prior discrimination from receiving the program's benefits.

C. The decision in *Fullilove* v. *Klutznick, supra,* does not indicate that this ordinance is constitutional. The Court in *Fullilove* merely upheld the facial constitutionality of an MBE program, without addressing the constitutionality of any concrete application of that or any other MBE program. Moreover, the program upheld in *Fullilove* is in critical respects different from the program in issue here. And, finally, the Court rested its holding in *Fullilove* on the special authority and competence of Congress to address at a national level in broad-brush terms a problem of overriding national interest—*i.e.,* the need to redress an unyielding pattern of discrimination against minority contractors in many parts of the nation. That overriding national interest was said to justify a federal statute touching the outer limits of congressional authority and constrained only by the Due Process Clause of the Fifth Amendment. It does not justify a racial classification by a city directly constrained by the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

THE RICHMOND CITY ORDINANCE, WHICH REQUIRES EVERY NONMINORITY PRIME CONSTRUCTION CONTRACTOR TO SUBCONTRACT AT LEAST 30% OF THE VALUE OF ITS CITY CONTRACTS TO MINORITY BUSINESS ENTERPRISES, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Appellant contends that its ordinance requiring every nonminority prime construction contractor to subcontract at least 30% of the value of its city contracts to MBEs is consistent with the Equal Protection Clause of the Fourteenth Amendment. Based on our understanding of the scrutiny required by that Clause, the substantive constraints that the Clause imposes on state and local governments, and the purposes and operation of this ordinance, we submit that this Court should reject appellant's contention.

A. Laws Which Classify On The Basis Of Race Should Be Sustained Only If "Narrowly Tailored" To Achieve A "Compelling" Interest, Regardless Of The Identity Of The Plaintiff Challenging Them Or The Purpose For Which They Are Adopted

The ordinance at issue in this case gives a preference to black, Hispanic, Oriental, Indian, Eskimo, and Aleutian contractors. It plainly classifies on the basis of race and is thus in tension with the fundamental principles embodied in the Equal Protection Clause that skin color and national origin are generally inappropriate bases upon which to rest official distinctions between people. *Brown* v. *Board of Educ.*, 347 U.S. 483, 493-495 (1954); *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944); *Strauder* v. *West Virginia*, 100 U.S. 303, 307-308 (1879). Accordingly, under the Court's modern equal protection cases, the ordinance is constitutionally suspect. See *Palmore* v. *Sidoti*, 466 U.S. 429, 432-433 (1984); *Loving* v. *Virginia*, 388 U.S. 1, 10-11 (1967).

The Court has made clear, of course, that, while suspect, government action based on race is not always constitutionally invalid. See, *e.g.*, *Korematsu* v. *United States*, 323 U.S. 214

(1944); see also *Lee* v. *Washington*, 390 U.S. 333, 334 (1968) (Black, Harlan, Stewart, JJ., concurring). A court of equity may, for example, permissibly take race into account in remedying past acts of intentional, unlawful discrimination on the basis of race. See, *e.g.*, *United States* v. *Paradise*, No. 85-999 (Feb. 25, 1987); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). Similarly, a competent governmental authority may permissibly take race into account in remedying its own identified history of prior illegal discrimination. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion). And a state may permissibly take race into account in ensuring that its reapportionment plan complies with Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. See *United Jewish Orgs.* v. *Carey*, 430 U.S. 144, 160 (1977). But " '[d]istinctions between citizens solely because of their ancestry' * * * [are] 'odious to a free people whose institutions are founded upon the doctrine of equality' " (*Loving* v. *Virginia*, 388 U.S. at 11, quoting *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)). And on that account, in many cases covering a wide range of circumstances, the Court has unanimously ruled that, to pass constitutional muster, a law classifying on the basis of race or ethnicity ordinarily "must be justified by a compelling governmental interest and must be 'necessary * * * to the accomplishment' of [its] legitimate purpose" (*Palmore* v. *Sidoti*, 466 U.S. at 432-433 (citation omitted)).

The Court, however, "has yet to reach consensus on the appropriate constitutional analysis" to be applied where a race or ethnic classification is invoked to achieve a remedial purpose (*United States* v. *Paradise*, slip op. 14-15). Several Justices have said that the level of judicial scrutiny should not change in the remedial context and that even the remedial use of race or ethnicity must be "narrowly tailored" to the accomplishment of a "compelling" governmental purpose. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 273-274 (plurality opinion); *United States* v. *Paradise*, slip op. 1 (O'Connor, J., dissenting, joined by the Chief Justice and Scalia, J.). Other Justices, by contrast, have said that, while elevated judicial scrutiny is necessary, the

"remedial use of race is permissible if it serves 'important governmental objectives' and is 'substantially related to achievement of those objectives' " (*Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 301-302 (citation omitted) (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.)). The remaining Justices have not clearly settled on a standard of review for remedial uses of race.[2]

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[2] Justice Stevens has rejected the argument that a district court's remedial use of race must be "narrowly tailored to achieve a compelling governmental interest" (*United States* v. *Paradise*, slip op. 2 (Stevens, J., concurring in the judgment)). But he did so on the ground that equitable decrees of federal courts are ordinarily subject to an "abuse of discretion" standard and that "a uniform standard should govern our review of all such decrees entered by District Courts" (*id.* at 6-7 n.4). At the same time Justice Stevens expressly recognized (*ibid.*) that the review of remedial court orders "is dramatically different from the question whether a statutory racial classification can be justified as a response to a past societal wrong." He has indicated that, in the instance of statutory classifications, a more exacting level of judicial scrutiny is appropriate—one that ascertains whether the purpose of the racial classification is constitutionally legitimate, whether the procedures used to adopt the ordinance were thorough and fair, whether the classification shows disrespect for, or imposes an unfair burden on, any person, and whether the classification is "narrowly tailored" to achieve its objective. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 317-320 (Stevens, J., dissenting); *Fullilove* v. *Klutznick*, 448 U.S. at 537-539, 548-554 (Stevens, J., dissenting).

Justice White has not clearly indicated the standard of review that he would apply to remedial uses of race. Without specifying a standard of review, he has twice voted to hold invalid certain remedial uses of race by government. See *United States* v. *Paradise*, slip op. 1 (White, J., dissenting); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 294-295 (White, J., concurring in the judgment). By contrast, in *Fullilove* v. *Klutznick*, he voted to uphold the constitutionality of an MBE preference enacted by Congress; but, in doing so, he joined with Chief Justice Burger in declining (448 U.S. at 491-492) to "adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *Regents of the Univ. of California* v. *Bakke*, 438 U.S. 265 (1978)." And in *Bakke*, where he voted to uphold the constitutionality of the affirmative action measure in issue, Justice White joined (438 U.S. at 387 n.7) both Part III-A of Justice Powell's opinion, which said that all uses of race by government must be subjected to the strictest of judicial scrutiny (438 U.S. at 287-291), and Justice Brennan's opinion, which indicated that the remedial use of race by government may be sustained if it is "substantially related" to

The lower courts need guidance on this issue and, for the reasons set forth in our *Wygant* brief (at 9-22),[3] we believe that the Court should now hold that the standard of review of racial or ethnic statutory classifications is the same regardless of the purpose underlying it or the groups at which it is directed—*i.e.*, the racial or ethnic classification must be "narrowly tailored" to the accomplishment of a "compelling governmental interest." That a governmental classification has a remedial objective may make the classification more likely to withstand judicial scrutiny, but the level of judicial scrutiny should not change. Accord *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 n.9 (1982); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 285-286 (O'Connor, J., concurring). The Equal Protection Clause is a guarantee of equality to all individuals. See *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886). "If it is the individual who is entitled to judicial protection against classifications based on his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then * * * the standard of justification [should] remain constant" (*Regents of the Univ. of California* v. *Bakke*, 438 U.S. at 299 (opinion of Powell, J.)). Accord *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 273-274 (plurality opinion); cf. *United States* v. *Paradise*, slip op. 7 n.4 (Stevens, J., concurring in the judgment) ("a uniform standard should govern our review of the merits of an equal protection claim"). See generally Days, *Fullilove*, 96 Yale L.J. 453 (1987).

B. Appellant's Ordinance Is Not "Narrowly Tailored" To The Accomplishment Of A "Compelling" Governmental Purpose

The question for decision in this case, therefore, has two components: first, whether any "compelling" governmental interest on appellant's part may reasonably be found to

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the achievement of "important governmental objectives" (438 U.S. at 356-362).

Justice Kennedy has yet to express an opinion concerning the standard of review applicable to the remedial use of race.

[3] We are providing counsel for appellant and appellee with copies of our *Wygant* brief.

justify its MBE preference program; and, second, whether appellant's MBE preference program is "narrowly tailored" to the accomplishment of that compelling governmental purpose. We submit that both of these questions should be answered in the negative.

1. Three justifications have been offered for this ordinance. First, the ordinance itself proclaims that it is "remedial and is enacted for the purpose or [*sic*] promoting wider participation by minority business enterprises in the construction of public projects, either as general contractors or subcontractors" (J.S. Supp. App. 248). Second, the dissent below and at least one of appellant's amici suggest (J.S. App. 18a-21a; Lawyers' Comm. For Civil Rights Under Law, *et al.* Br. 22-24) that the ordinance can be justified as a remedy for the city's own prior discrimination in the awarding of public construction contracts. Finally, appellant argues (Br. 20-33) that the ordinance is a remedy for the effects of prior discrimination in the local construction industry. On the record as it stands, none of these asserted interests is sufficient to sustain this racial classification.

a. The interest in increasing MBE participation in the construction of public projects is not, standing apart from any historical predicate justifying race consciousness, a legitimate governmental interest, much less a compelling one. While the government has a legitimate interest in ensuring equal access of all races to construction projects involving public funds, and in remedying prior identified discrimination, it has no legitimate interest in ensuring—as an end in itself—any specific representation of minorities in the construction of those projects. As Justice Powell explained in *Bakke* (438 U.S. at 307), "If [appellant's] purpose is to assure within its [local construction industry] some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."

b. Nor can this ordinance be justified as a remedy for appellant's own prior discriminatory actions. To be sure, a state or local government has a compelling interest in remedying its own

past and present discrimination. See *United States* v. *Paradise*, slip op. 15; *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 274 (plurality opinion); *id.* at 288-294 (O'Connor, J., concurring). But no basis has been offered for finding that appellant has engaged in any such discrimination. The ordinance does not say that it is a remedy for prior discrimination by the city or identify any basis for believing that such discrimination has occurred. Nor did the members of the City Council in debating the ordinance refer to any instances of prior or present discrimination by the city. See, *e.g.*, J.A. 15-16. And, most importantly, the record does not provide "convincing evidence that remedial action is warranted" to correct discrimination in the city's awards of public construction contracts. *Wygant*, 476 U.S. at 277. Nor does even appellant itself suggest a basis for a contrary conclusion.[4]

c. Rather, appellant argues (Br. 19-20) that the ordinance is a remedy for discrimination that is attributable to others—specifically, private firms in the local construction industry. While it is permissible for a state or local government, in appropriate circumstances, to seek to remedy unlawful discrimination by others, appellant has not identified the acts of unlawful discrimination it is allegedly seeking to remedy. Accordingly, this race-based ordinance cannot be justified as a remedy for discrimination by others.

(1) State and local governments plainly have a legitimate interest in preventing race discrimination and in remedying past and present discrimination. See *Roberts* v. *United States*

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[4] Amici plainly err in suggesting (see, *e.g.*, Lawyers' Comm. for Civil Rights Under Law, *et al.* Br. 13-15) that, where it purchases goods and services from firms in a particular industry, a city government may be held legally responsible for private discrimination occurring in that industry of which it is aware. Under the Equal Protection Clause, government may be held liable only for intentionally discriminatory actions (*Washington* v. *Davis*, 426 U.S. 229 (1976)), and " '[d]iscriminatory purpose' * * * implies more than intent as volition or intent as awareness of consequences.' " *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979).

Jaycees, 468 U.S. 609, 624 (1984).[5] Race discrimination deprives members of the communities that those governments represent of their individual dignity. Accord *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 250 (1964). Moreover, it denies the community as a whole the benefits associated with wide participation by all persons in political, economic, and cultural life. See *Roberts* v. *United States Jaycees,* 468 U.S. at 625. Accordingly, since at least the time of *Brown* v. *Board of Educ.,* 347 U.S. 483 (1954), this Court has recognized the compelling nature of the government's interest "in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination" (*Regents of the Univ. of California* v. *Bakke,* 438 U.S. at 307 (opinion of Powell, J.)), whether that "identified discrimination" is attributable to governmental or private parties. See *Roberts* v. *United States Jaycees,* 468 U.S. at 624-625; *Wygant* v. *Jackson Bd. of Educ.,* 476 U.S. at 274 (plurality opinion).

(2) On the other hand, the Court has been quite demanding regarding the showing that will serve as a predicate for a racial classification that purports to remedy prior discrimination. As Justices Powell and O'Connor have noted, the Court has never "held that societal discrimination alone is sufficient to justify a racial classification" (*Wygant* v. *Jackson Bd. of Educ.,* 476 U.S. at 274 (plurality opinion)). *Id.* at 288 (O'Connor, J., concurring). Societal discrimination is "an amorphous concept of injury that may be ageless in its reach into the past" (*Regents of the Univ. of California* v. *Bakke,* 438 U.S. at 307 (opinion of Powell, J.)), and "timeless in [its] ability to affect the future" (*Wygant* v. *Jackson Bd. of Educ.,* 476 U.S. at 276 (plurality opinion)). It has "no logical stopping point," because it "does not necessarily bear a relationship to the harm caused by prior discriminatory * * * practices" (*id.* at 275, 276). Thus, while

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[5] It should be emphasized that *Roberts* is in sharp contrast to this case. In *Roberts,* the Minnesota Human Rights Act, far from authorizing special treatment on the basis of race or gender, prohibited any such discrimination, and did so as a remedy for a previously existing pattern of discriminatory treatment. 468 U.S. at 623-624.

there is no "doubt[ ] that there has been serious racial discrimination in this country," a plurality of four Justices in *Wygant* held that, "as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive" (*id.* at 276 (emphasis in original)). And while Justice White did not join the plurality's opinion, there is reason to believe that he agreed with the plurality on this point. See *id.* at 295 (White, J., concurring in the judgment) ("[n]one of the interests asserted by the [government], singly or together, justif[ied] th[e] racially discriminatory layoff policy and save[d] it from the strictures of the Equal Protection Clause").

(3) No opinion of this Court has explicitly defined the distinction between "societal discrimination," which is insufficient to justify a racial remedy,[6] and the kind of prior discrimination proof of which will justify recourse to a racial remedy. Since, however, that distinction has received particular emphasis in opinions of Justice Powell, it is not surprising that those opinions also provide the doctrinal basis for the distinction.

In *Bakke,* Justice Powell argued that this Court has "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations" (438 U.S. at 307). He explained (*id.* at 307-308) that "[a]fter such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined." He added that "[w]ithout such findings of constitutional or statutory violations, it cannot be said that the

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[6] Societal discrimination would, no doubt, provide a legitimate justification for a non-race based mechanism that is rationally connected to its remedial goal. See generally *City of New Orleans* v. *Dukes,* 427 U.S. 297 (1976); cf. *Defunis* v. *Odegaard,* 416 U.S. 312, 337-340 (1974) (Douglas, J., dissenting).

government has any greater interest in helping one individual than in refraining from harming another" (*id.* at 308-309 (footnote omitted)). This conclusion is necessary, Justice Powell stated, because "[t]o hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step [the Court] ha[s] never approved" (*id.* at 310).

Justice Powell's concurring opinion in *Fullilove* reiterated (448 U.S. at 497) that "this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations." And he added (*id.* at 498) that "[b]ecause the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred."

The plurality opinion in *Wygant* also appears to rest on this theme. It rejected the effort of a public school board to justify its race-based layoffs by reference to the effects of prior societal discrimination. 476 U.S. at 274-276. It stated that such a racial classification can be justified only if the public employer has "sufficient evidence to justify the conclusion that there has been prior discrimination" inconsistent with the Constitution (*id.* at 277). Without such evidence, the opinion added, the public employer would simply be attempting to remedy prior "societal discrimination," and that is not a compelling justification for a racial classification (*id.* at 277-278).

(4) In short, under the view explicitly adopted by four Justices in *Wygant*, and quite possibly adhered to by Justice White as well, a racial classification can be justified as a remedy for prior discrimination, and thus satisfy scrutiny under the Equal Protection Clause, only if a prior history of unlawful discriminatory action, whose effects are to be remedied, has been identified with some particularity. Appellant has not done

so. Assuming for purposes of this case that a private person's racially-motivated refusal to contract with a minority-owned construction firm is unlawful (see Appellant Br. 30-31 & n.53, citing *Runyon* v. *McCrary*, 427 U.S. 160 (1976)), appellant has nonetheless failed to identify a single such act of discrimination.[7]

Appellant responds (Br. 20-21) that the substantial disparity between the percentage of city contracts awarded to minority businesses and the percentage of minorities in Richmond is evidence of discrimination.[8] But, for all that has been shown, that disparity is the result of many discrete and isolated decisions by many actors exercising their independent and unrelated authority to determine where to allocate scarce resources and capital—*e.g.*, city contracting officers awarding contracts, prime contractors entering into subcontracts, banks and bonding officers issuing loans and providing bonds, and minority and non-minority subcontractors seeking construction work. The simple percentage comparison advanced by appellant cannot support a conclusion of discriminatory intent in those numerous separate decisions, each made in distinct circumstances and for numerous (and perhaps entirely lawful) reasons, none of which appellant has considered or analyzed.

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[7] Appellant errs in suggesting (Br. 27-28) that the district court made "findings" with respect to past discrimination that may not be overturned on appeal. The district court decided this case on cross-motions for summary judgment and thus was in no position to, and did not, make any findings of disputed fact. See C. Wright & A. Miller, *Federal Practice & Procedure* § 2575 (1971).

[8] At most, the claim sounds like the "societal discrimination" rejected in *Wygant*. Just as an amorphous assertion of unspecified discrimination levelled at society at large suggests no "compelling" basis for remedial action, so, too, a similarly amorphous claim of unspecified discrimination levelled at a particular industry at large fails to warrant this sort of legislative attention. Indeed, dispensing with the requirement for some measure of identification of past discrimination eviscerates the correlative requirement that the remedy for such discrimination be narrowly tailored.

Appellant's statistics are fundamentally defective in another sense as well. There is no reason to suppose that the racial composition of the relevant market of those available to undertake work as contractors and subcontractors in any way reflects the minority-nonminority breakdown of the population of Richmond. Construction is a skilled trade, and participation in construction contracting is limited by a bidder's ability, among other things, to obtain working capital, to meet bonding requirements, to follow bidding procedures, and to demonstrate an adequate "track record." The general population is not qualified to bid on and participate in public (or private) construction contracts. General population figures therefore provide no basis for inferring prior intentional discrimination by the industry, much less by any particular firm or firms in the industry. See *Hazelwood School Dist.* v. *United States,* 433 U.S. 299, 308 n.13 (1977). And, of course, if it is only this differential capacity that the city is seeking to remedy, then we are back again to societal discrimination.

Furthermore, construction contractors and subcontractors from outside of the City of Richmond, including appellee, which is an Ohio-based firm, apparently bid on and receive city construction contracts. The minority population outside of the City of Richmond is, however, much lower than either appellant's 50% minority population figure or its 30% MBE participation goal. Thus, even if general population figures were relevant, the Richmond city figures would not be the appropriate ones for use in a meaningful statistical comparison.

Appellant's testimonial evidence (Br. 23-27) provides no sounder basis for the city's program. The record reveals only "some conclusory and highly general statements made by a member of the public, a City Council member who supported the plan, and the City Manager" (J.S. App. 6a). "The member of the public who testified about discrimination was not even involved in the construction industry" (*ibid.*). The City Council member neither cited specific instances of discrimination nor

identified any perpetrators or victims. And the "City Manager's comments mainly had to do with the city of Pittsburgh" (*ibid.*). "Such meager evidence is not a sufficient finding of prior discrimination" by anyone (*ibid.*), much less by an entire industry.

Appellant cannot escape these deficiencies in its evidentiary base by noting (Br. 21-22) that the local construction industry trade associations have few, if any, black members. The record does not indicate that blacks have ever attempted to join these other industry organizations; that they have been denied membership because of their race; or that they have failed to apply because they reasonably believed that they would be denied membership because of their race. On the contrary, the record indicates that only 4.7% of the construction firms in the country are minority-owned, and that 41% of these firms are concentrated in California, Illinois, New York, Florida, and Hawaii (J.A. 35). In these circumstances, one would not expect the various local trade associations to have many black members. There are not many black-owned construction firms to begin with, and these few firms have concentrated their business activities elsewhere.

Nor can appellant escape the deficiencies in its evidence by noting (Br. 22-24, 33-38) that minorities, having for many years been purposely excluded from employment in the construction industry (presumably also in the Richmond area), on that account now face barriers to entry in this field because they have been prevented from obtaining the experience necessary to start construction businesses. This is, again, the "societal discrimination" claim rejected by this Court. Moreover, any such intentional discrimination in employment has been illegal since at least 1964 (see 42 U.S.C. 2000e *et seq.*), and appellant provides no evidence of a substantial unremedied recurrence of this discrimination since that time. Furthermore, the unintentional perpetuation of the effects of this past discrimination, which may result from imposition of certain race-neutral criteria in the

selection of subcontractors—*e.g.*, bonding requirements, experience requirements, working capital requirements—does not itself involve unlawful conduct (see *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375 (1982) (no disparate impact claims under 42 U.S.C. 1981)), and thus provides no basis for a race-conscious remedy. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 276 (plurality opinion); *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 434-439 (1976).[9]

Finally, appellant cannot properly justify its ordinance by reference (Br. 25-26) to the national pattern of discrimination that Congress identified and relied upon in enacting the 10% MBE participation requirement of the Public Works Employment Act of 1977 (PWEA), Pub. L. No. 95-28, 91 Stat. 116, which this Court upheld in *Fullilove* v. *Klutznick*, *supra*. The fact that Congress found a national pattern of discrimination in the construction industry does not absolve particular localities wishing to adopt race-conscious relief from identifying such discrimination in their areas. Moreover, as we read *Fullilove*, the fact that Congress in 1977 enacted a national program providing a basis for race-conscious relief for prior discrimination

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[9] By contrast, certain employment practices which have a disparate impact may constitute a violation of Title VII, even though no discriminatory intent is shown. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). *United Steelworkers* v. *Weber*, 443 U.S. 193, 209 (1979); *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977). The same is not generally true outside the Title VII context. See *Washington* v. *Davis*, 426 U.S. 229 (1976) (Equal Protection Clause); *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375 (1982) (Section 1981).

Appellant errs in suggesting (Br. 30-31 n.53, 34-38) that the reasoning of cases decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*—such as *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987)—justify its race-based actions. Those cases merely address the permissibility of certain race-conscious actions by employers which may escape the strictures contained in *Title VII*; those cases do not address the permissibility of race-conscious action by employers in light of the prohibitions contained in the Equal Protection Clause. While Title VII and the Equal Protection Clause promote certain common objectives, this Court does "not regard as identical the constraints of Title VII and the federal constitution on voluntarily adopted affirmative action plans" (*Johnson* v. *Transportation Agency*, slip op. 14).

in the construction industry—with particular applications being justified case-by-case, on the basis of local history and circumstances (see *Fullilove,* 448 U.S. at 470-471)—does not of itself establish that there were discriminatory effects remaining in 1983 sufficient without more to justify the additional race-conscious remedy adopted here. Appellant has thus not shown that it was reasonable to rely in 1983 in Richmond on Congress's national findings made in 1977. See *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) (government may rely on studies by other governments that are "reasonably" applied in its particular context). In particular, there is no basis for concluding that there were actual acts of unlawful discrimination whose effects remained uncorrected.[10]

2. Of course, even if appellant's ordinance could be justified by general reference to unspecified acts of discrimination in the local construction industry, it would still need to be "narrowly tailored" as necessary to remedy that alleged discrimination. The Court has indicated that, in determining whether a remedy is narrowly tailored, a number of factors are relevant: the necessity for the relief and the efficacy of alternative remedies; the relationship of any numerical requirements to available minority members in the relevant market; the effect of the remedy on third-persons; the planned duration of the remedy; and the availability of meaningful waiver provisions. Of these, surely the crucial factor should be that non-race-specific remedies have been or clearly would be unavailing. See *United States* v. *Paradise,* slip op. 19 (plurality opinion); *Local 28, Sheet Metal Workers Int'l Ass'n* v. *EEOC,* 478 U.S. 421, 475-481 (1986) (plurality opinion). Consideration of these fac-

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[10] Requiring state or local governments to establish these facts by firm evidence—either contemporaneously or by proof at trial—will not discourage voluntary action by government to remedy violations of law. Cf. *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 290-293 (O'Connor, J., concurring). In these circumstances, government is not trapped between liability to minorities if affirmative action is not taken to remedy the apparent discrimination and liability to nonminorities if affirmative action is taken. Cf. *ibid.* It is the actions of non-governmental actors that are in question and thus the government need not be concerned about its own liability at all.

tors indicates that appellant's ordinance is not "narrowly tailored" to the accomplishment of its purported objective.

Appellant has no basis for suggesting either that its race-based ordinance was necessary or that race-neutral alternatives were unavailable. The record does not indicate that appellant ever considered, much less tried, less intrusive means of remedying any effects of the alleged prior discrimination in the local construction industry. There is no indication that appellant has ever reviewed its bidding practices to make sure that they are intelligible and accessible to all; that it has ever instituted special advertising and outreach programs to attract MBEs to its construction projects; that it has ever authorized special public financing for firms that have been or are unable to post bonds or to borrow money for reasons unrelated to their credit rating; or that it has ever provided training and certification programs to ensure that experience requirements do not bar entry into this field. On the contrary, appellant apparently turned to a race-based program without any effort whatever to put in place a less drastic remedy. Such a course is not constitutionally permissible. Cf. *United States* v. *Paradise*, slip op. 20-25 (non-victim-specific, race-conscious remedies appropriate only in instances of "egregious" discrimination); *Local 28, Sheet Metal Workers' Int'l Ass'n* v. *EEOC, supra* (same).

Moreover, appellant chose a percentage set-aside that bears no reasonable relationship to the percentage of minority group members in the relevant market of businesses available to supply these services. The term "MBE" is defined in the ordinance to include businesses owned not only by blacks, but also by Hispanics, Orientals, Indians, Eskimos, and Aleuts. Thus, even if the disparity between the proportion of blacks in the population and the proportion of black-owned businesses receiving contracts was evidence of prior discrimination against blacks, the ordinance would still be unjustified as providing a race-based preference to groups that have not previously been discriminated against. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 284 n.13 (plurality opinion) (criticizing affirmative action plan for its "undifferentiated nature"). And, in all events, as we explained above, appellant has not shown the statistical

relevance of the 30% figure, or in any way sought to determine the actual make-up of the relevant subcontractor market, looking to geography and qualifications. Its 30% MBE requirement cannot, therefore, constitute a reasonable estimate of the amount of city contracting dollars that would have reached minorities in the absence of discrimination. See *Johnson* v. *Transportation Agency*, slip op. 7-8 (O'Connor, J., concurring in the judgment).[11]

Furthermore, the burden that the 30% MBE participation requirement requires nonminority construction firms to shoulder is substantial. The set-aside here is quite large and, unlike smaller set-aside programs, constitutes a significant denial of public contracting opportunities to non-minority contractors. Further, as the court below noted (J.S. App. 11a), "[i]n many construction contracts, the dollar allocation among subcontractors will not break into a thirty percent block." In that circumstance, the set-aside could easily amount effectively to a much higher percentage. That this denial affects the economic fortunes of businesses operating on the local level, where small businesses predominate, and where businesses live from subcontract to subcontract, only aggravates the ordinance's adverse effect. It means that the set-aside may have a substantial adverse effect on a number of businesses and require the layoff of innocent workers. The Court has made clear that such adverse effects are cause for serious constitutional concern. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 282-284 (plurality opinion); *id.* at 295 (White, J., concurring in the judgment); see also *Associated Gen. Contractors* v. *City & County of San Francisco*, 813 F.2d 922, 936 (9th Cir. 1987).

The duration of appellant's MBE preference further magnifies these tailoring problems. This ordinance is not a one-shot funding measure, enacted, as in *Fullilove*, to ward off the

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[11] Indeed, the "piece of the action" (*Fullilove* v. *Klutznick*, 448 U.S. at 536 (Stevens, J., dissenting)) nature of this ordinance becomes clear when one appreciates that it is irrelevant to appellant's scheme that a business may have significant minority participation in its ownership or management, so long as it is less than 50% minority owned.

foreseeable effects of an imminent economic recession and to provide minority contractors with the experience necessary for continued success without governmental assistance. Cf. *Fullilove* v. *Klutznick*, 448 U.S. at 511-512 (Powell, J., concurring). Rather, it is a long-term element of appellant's construction contract award criteria. Appellant has committed itself to engaging in race discrimination for a five-year period, whether the prior discrimination that the preference allegedly seeks to redress is remedied before the end of that period or not.[12]

Finally, the waiver and exemption provisions of the ordinance do not cure the ordinance's overbreadth and other constitutional deficiencies. There is no exemption for nonminority contractors that can prove a history free of racial discrimination.[13] There is no adequate relief mechanism for nonminority contractors who are harshly affected by this ordinance's operation, or even for those who have significant minority participation in their management or ownership. And there is no disqualification of minority contractors who are not suffering from the effects of identified illegal discrimination—such as minority contractors who were formed after the enactment of this statute, or who have successfully vindicated their rights through suits under 42 U.S.C. 1981.[14] Such a law is not a "narrowly tailored" remedy for the past intentional exclusion of minorities from the construction industry, but rather a racial "bloc grant" of the kind deplored by Justice Powell in his *Wygant* opinion. See 476 U.S. at 281 n.8.

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[12] The fact that the set-aside program is now scheduled to expire in June 1988 does not alter the fact that the Court must assess the constitutionality of a program projected at the time of enactment to be in place, and which has in fact been in place, for five years.

[13] The record provides, for example, no basis for believing the appellee, an Ohio-based contractor, played any role in discrimination in the local construction industry.

[14] The record does not suggest, for example, that the MBE that provided the untimely price quote in this case is itself a victim of identified discrimination in the past.

C. The Court's Decision In *Fullilove* Does Not Support The Constitutionality Of This MBE Preference Ordinance

Appellant and its amici respond (Br. 21 n.33, 24 n.39, 35-36 & n.60, 40; Nat'l League of Cities, *et al.*, Br. 7-14) that, in *Fullilove* v. *Klutznick, supra*, this Court approved an MBE preference program with all of the aforementioned features and that, accordingly, this ordinance must be approved as well. But appellant and its amici misunderstand both the basis for and the limited holding of the *Fullilove* decision.

In *Fullilove*, the Court faced the question whether the 10% MBE preference requirement of Section 103 of the PWEA (91 Stat. 117) was facially constitutional—*i.e.*, whether it could be constitutionally applied in a substantial number of situations. See 448 U.S. at 480-481 (plurality opinion); *Parker* v. *Levy*, 417 U.S. 733, 760 (1974). In seeking to answer this question, three Justices found that the PWEA was a stop-gap funding measure designed to offset the effects of an imminent recession (*id.* at 456-458); that MBEs had historically received a relatively small percentage of federal contracting funds and that Congress attributed much of this nonparticipation by minorities to purposeful discrimination by private and public contractors (*id.* at 458-463); see also *id.* at 506 (Powell, J., concurring)); that, since at least 1953, the federal government had unsuccessfully attempted through non-racial means to remedy this history of prior discrimination and to eliminate some of the barriers to MBE participation in federal contracting (*id.* at 463-467 (plurality opinion)); and that, as fleshed out by the responsible administrative agency, the PWEA accorded a preference in the competitive bidding process only to those MBEs whose inability to compete effectively could be attributed to the effects of identifiable race discrimination committed in the past (*id.* at 470-471). On these premises, the Court, with no majority opinion and three dissenting Justices, held that the MBE provision of the PWEA should be upheld against a facial constitutional challenge. See *id.* at 473-492; *id.* at 517-522 (Marshall, J., concurring in the judgment).

In reaching this judgment, however, the Justices casting the determinative votes made clear that they were not addressing any questions relating to specific applications of the MBE program. *Fullilove* v. *Klutznick*, 448 U.S. at 480-481. Indeed, they specifically declined to address whether the Constitution requires a more specific identification of perpetrators, victims, and/or discriminatory acts before a racial preference may actually be implemented in any particular case. See *id.* at 486-488 & n.73 (opinion of Burger, C.J.). That, of course, is the precise question that appellee has raised here in challenging the application of appellant's ordinance to it.

Moreover, the MBE preference program approved in *Fullilove*, is, as just discussed, quite different from the MBE preference program at issue here. As Chief Justice Burger characterized it, the national MBE preference program approved in *Fullilove* was enacted by Congress at least in part as a remedy for an identified history of purposeful discrimination against MBEs by private and public contracting agencies; here, as explained above, no such history of identified purposeful discrimination against minority contractors has been sufficiently established, and certainly no such history of identified discrimination traceable to appellee.[15] Similarly, as the plurality

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[15] Appellant and amici protest (Appellant Br. 21 n.33; Nat'l League of Cities, *et al.* Br. 7-8) that the statistical disparity relied upon by appellant in enacting this ordinance is identical to the statistical disparity relied upon by Congress in enacting Section 103 of the PWEA. But Congress relied upon the statistical disparity cited by appellant and its amici only as a basis for suggesting, as a general matter, that a race-conscious remedy was necessary in order to remedy instances of prior intentional discrimination to be addressed in particular cases as established in the course of the detailed administration of the program. Congress did not rely upon the statistical disparity to establish the history of identified discrimination necessary to justify any particular, actual race-conscious contract award. See 448 U.S. at 459, 462-463 (plurality opinion); *id.* at 504-506, 511 (Powell, J., concurring).

Appellant and amici likewise err in suggesting (Appellant Br. 23, 26-27; Nat'l League of Cities, *et al.* Br. 9) that the nonstatistical evidence relied upon by appellant is identical to the nonstatistical evidence relied upon by Congress in enacting Section 103 of the PWEA. The two situations simply are not comparable. Appellant relied upon general and conclusory observations by three

characterized it, the MBE program approved in *Fullilove* was appropriately tailored to accomplish its remedial goal. The government had already unsuccessfully attempted to remedy, by race-neutral measures, the prior discrimination it found; the race-based measure adopted was a one-shot measure enacted in the face of an oncoming recession; at 10%, the set-aside required non-minority contractors to shoulder a lighter burden than in the present case; and, most significantly, the MBE preference was no more than a presumption (*i.e.*, in application, the set-aside could be waived where an MBE was not suffering from the effects of prior illegal discrimination). As discussed above, appellant's MBE program is not tailored in this fashion.

In any event, the MBE preference program approved in *Fullilove* is embodied in an Act of Congress, not in a city ordinance, and thus, in a constitutional sense, is fundamentally different from this ordinance. Congress has broad remedial powers deriving from the enforcement provisions of the Thirteenth and Fourteenth Amendments and the Commerce and Spending Clauses. See *Fullilove* v. *Klutznick*, 448 U.S. at 472-475, 483-484, 490 (opinion of Burger, C.J.); *id.* at 500, 508-510, 516-517 (Powell, J., concurring). Moreover, the Equal Protection Clause was expressly adopted to limit the authority of state and local governments (and not the federal government) to use race in making governmental decisions. Acts of Congress, by contrast, are restrained by the equal justice component of the Due Process Clause of the Fifth Amendment. While that provision places restraints on Congress and the President that are similar to those the Equal Protection Clause places on state and local governments, "the two protections are not always coextensive," and the Court has recognized that "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State."

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persons at a city council hearing. Congress relied upon studies done over a lengthy period of time by various legislative committees and administrative agencies. See 448 U.S. at 456-467 (plurality opinion).

Hampton v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976).[16] In *Fullilove*, the Court found such an overriding national interest—*i.e.*, the need to remedy the economic inequality attributable to an unyielding nationwide pattern of past discrimination—and, in view of the unique powers of and limitations on the Congress, was thus impelled to approve a racial criterion even though it "press[ed] the outer limits of congressional authority" (448 U.S. at 490). See also *id.* at 483. No such congressional powers or determination of national interest is implicated here, and the city government is constrained directly by the Equal Protection Clause of the Fourteenth Amendment. Especially in view of these circumstances, the ordinance's use of racial criteria cannot be sustained.[17]

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[16] This is reasonable in part due to the indirect protections that individuals derive when power is located in an office of government responsible to all who can be affected by its exercise, which is true of Congress, but not of state and local governments, where parochial interests may sometimes hold much more uninhibited sway. See *Associated Gen. Contractors* v. *City & County of San Francisco*, 813 F.2d at 928-934; see generally, *The Federalist* No. 10, at 22 (J. Madison) (C. Rossiter ed. 1961).

[17] Amicus Nat'l League of Cities, *et al.* errs in suggesting (Br. 9-10, 19-21) that state and local governments should not be required to make more detailed findings concerning prior discrimination than those made by Congress in justifying the 10% MBE preference of the PWEA. Congress legislates with respect to problems of great scope and, accordingly, should not have to confine its vision to the facts and evidence adduced by particular parties, but should be able to paint with a broad brush in its legislative action. State and local governments, by contrast, operate on a substantially smaller scale. It is therefore reasonable to require them to bear a greater burden of justification in defending race-based actions. Accord *Fullilove* v. *Klutznick*, 448 U.S. at 515-516 n.14 (Powell, J., concurring) ("[t]he degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies * * * var[ies] with the nature and authority of a governmental body"). Indeed, the language and purpose of the Equal Protection Clause would seem to require as much. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 273-278 (plurality opinion).

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

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No. 87-998

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OF THE UNITED STATES
October Term, 1987

CITY OF RICHMOND,

Appellant,

v.

J. A. CROSON COMPANY,

Appellee.

On Appeal from the United States
Court of Appeals for the Fourth Circuit

BRIEF OF THE STATE OF MICHIGAN AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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This Brief of the State of Michigan as *Amicus Curiae* in Support of Appellant is filed pursuant to Supreme Court Rule 36.4.

INTEREST OF AMICUS CURIAE

Michigan's Public Act 428 of 1980 provides that 7% of all State expenditures for the procurement of goods, services and construction shall be awarded to minority owned businesses and 5% of all such expenditures shall be awarded to women owned businesses. MCL 450.771 *et seq.*; MSA 3.540(51) *et seq.* A "minority" under the Act is a person who is "black, hispanic, oriental, eskimo or an American Indian." *Id.*

During the early 1970's the State of Michigan recognized the underutilization of minority and women owned business in state contracting. The State first attempted to address the problem by easing bonding requirements on small construction projects. *See Michigan Road Builders Ass'n v Milliken*, 571 F Supp 173, 178 (ED Mich, 1983) ("District Court opinion"). The State also created a Division of Minority Business Enterprise to provide managerial and financial assistance to minority business. *See* Public Act 165 of 1975, MCL 125.1221 *et seq*; MSA 3.540(31) *et seq*. Later the State adopted a modest, non-binding goal of one percent minority business participation in state contracting. District Court opinion, 571 F Supp at 183-4.

None of these measures, however, corrected the underutilization of minority and women owned businesses in state contracting.

A 1974 study commissioned by the State of Michigan[1] found that out of $437 million dollars in state contracts for goods and services, only an estimated $225,000—or 0.05% of the total—had been awarded to minority owned businesses.[2] Yet, based on 1969 U. S. Economic Census data, there were more than 8,000 minority owned businesses in Michigan, with gross receipts of nearly $320 million and distributed over more than 50 construction, manufacturing,

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1. "A Public Procurement Inventory on Minority Vendors State of Michigan," by Urban Markets Unlimited, Milwaukee, Wisconsin, July 1974. See District Court opinion at 179-181.

2. The "Urban Markets Study" defined a minority owned business enterprise as "a business in which one or more minority persons own or control at least 50 percent of a given enterprise. Such persons include Black Americans, American Indians, Spanish-Americans, Oriental-Americans, Eskimos, and Aleuts." P iv (footnote).

sales and service categories which matched state purchasing requirements.[3]

The 1974 study also included a survey of state purchasing officials, which revealed "unfounded negative attitudes" against minority vendors.[4] The study noted that there was "a sizeable number of competent minority businesses in the State" and that "to rationalize that the lack of success in minority procurement is based upon minorities incompetency and non-responsiveness is not supported by the evidence."[5]

The study also noted that state agencies did not actively seek new sources of vendors, and that "the key to purchasing success with minority vendors is the will to do business." The study concluded with the finding that "*State procurement practices are not equitable in the treatment of minority vendors.*" (Emphasis in the original.)[6]

In 1976 minorities represented about 14% of the total population of Michigan, and owned about 6% of the businesses in the five major industrial sectors. *See Michigan Road*

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(3)

According to 1977 U. S. Economic Census data, the number of minority owned businesses in Michigan increased to 10,840 with gross receipts of nearly $580 million. There were twice as many women owned businesses (21,727), with gross receipts of nearly $1.5 billion. See 1977 Survey of Minority Onwed Business Enterprise (Table 2b) and 1977 Economic Census Women Owned Businesses (Table 2), Selected Statistics by Geographic Division, State and Industry Division (Michigan), U. S. Bureau of the Census.

(4)

District Court opinion at 179.

(5)

Id. at 181.

(6)

Id.

Builders Ass'n v Milliken, 834 F2d 583, 594 n. 13 (6th Cir, 1987) ("Court of Appeals opinion").

Although nearly 6% of all businesses in the State were minority owned and nearly 12% were women owned, each group received only one percent or less of annual state contracting expenditures.

In March 1976, a small business task force also found that "the State does not require contractors to solicit bids from small and minority subcontractors." *See* District Court opinion, 571 F Supp at 183. In May 1978, the Michigan Department of Civil Rights found that employee status reports submitted by state contractors "have consistently shown minorities and women to be excluded, underemployed or concentrated in stereotyped positions."[7]

In March 1979 Michigan House Bill 4335 was introduced and finally passed both houses of the legislature in December 1980, after more than a year and a half of debate and amendments. It was signed by the Governor on January 13, 1981 as Public Act 428 of 1980.

Under Public Act 428, the combined totals of prime contracts and subcontracts actually awarded to certified minority and women owned businesses apply to the goals. Based on the availability of minority and women owned businesses, state agencies have discretion to "set aside" prime contracts or require subcontracting to minorities and women under the Act.

In July 1981, 36 associational and individual plaintiffs brought suit in U. S. District Court against the Governor of

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[7] "A Report to the Governor on Implementation of Executive Directive 1975-6," May 15, 1978 Michigan Department of Civil Rights.

Michigan, and other State officials and departments, alleging that Public Act 428, on its face, violated their rights under the Equal Protection Clause of the Fourteenth Amendment and 42 USC §§ 1981, 1983 2000d and 2000e.

On August 12, 1983, the District Court granted the State's motion for summary judgment, finding that "there was sufficient evidence before the (Michigan) Legislature to make a finding of past intentional discrimination," and that Public Act 428 was a reasonable means of achieving its remedial purpose, in light of the criteria discussed in *Fullilove v Klutznick*, 448 US 448 (1980). Accordingly, the District Court held that Public Act 428 did not violate the Equal Protection Clause or federal civil rights law.

Plaintiffs appealed, and on November 25, 1987, the U. S. Court of Appeals for the Sixth Circuit, over a dissenting opinion, reversed the District Court and found that Public Act 428 violates the Fourteenth Amendment.

In its majority opinion, the Sixth Circuit relied in part on the Fourth Circuit's decision in *J. A. Croson Co v City of Richmond*, 822 F2d 1355 (4th Cir, 1987) in invalidating Public Act 428. *See* Court of Appeals opinion, 834 F2d at 590, 594-5 n. 14. Both *Croson* and *Michigan Road Builders* purportedly apply the constitutional standards for assessing remedial, affirmative action programs set forth in *Wygant v Jackson Board of Education*, 476 US 267, 106 S Ct 1842 (1986).

Since the same substantial federal questions are involved in both cases, and because the disposition of *Croson* will have a substantial bearing upon the *Michigan Road Builders* case, the State of Michigan has an interest as *amicus curiae*.

ARGUMENT

"The government unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *United States v Paradise*, ____ US ____, 107 S Ct 1053, 1065 (1987). However, the government also has an affirmative obligation to prohibit and remedy the effects of discrimination by contractors in government contracting. *See Fullilove*, 448 US at 475 ("the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities").

Government policy barring *employment* discrimination by government contractors has been in place since the mid-1950's. *See* Executive Order No 10479, 3 CFR 961 (1949-53); Executive Order No 10557, 3 CFR 203 (1954-58); and Executive Order 11246, 3 CFR 339 (1964-65). *See also* Michigan's Public Act 251 of 1955 and Sec 209 of the Elliott-Larsen Civil Rights Act of 1976, MCL 37.2209; MSA 3.548(209).[8] However, those provisions do not apply to discrimination by government contractors who refuse to subcontract with minority and women owned businesses.

State and local governments need only have "sufficient evidence" to establish "a firm basis for believing that remedial action is required." *Wygant v Jackson Board of Education, supra*, 106 S Ct at 1848 (Powell, J., plurality opinion for the Court) and 106 S Ct at 1853 (O'Connor, J., concurring). The evidence and the remedy will vary in gov-

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[8]

Both federal and state governments have also instituted administrative enforcement programs to insure "contract compliance" with equal employment opportunity. *See, eg*, 41 CFR Part 60 (Office of Federal Contract Compliance). The Michigan State Administrative Board, by resolution dated April 16, 1968, requires bidders on state contracts to demonstrate compliance with equal employment opportunity requirements prior to being awarded a contract.

ernment contracting, depending on whether the discrimination is by the government or by government contractors. While the Michigan legislature had before it evidence of discrimination by both government officials and government contractors, the City of Richmond only focused on discrimination by government contractors in developing its Minority Business Utilization Plan.

The Fourth Circuit errs in holding that the Richmond Plan can only be upheld based on a showing of prior discrimination by the governmental entity itself. *See J. A. Croson Co v City of Richmond, supra,* 822 F2d at 1358 and 1360. As the Court noted, there was "no showing that qualified minority contractors who submitted low bids were passed over" or that they had been "excluded from the bidding pool." *Id.*, at 1359. The Plan, however, does not attempt to remedy discrimination by the City against minority contractors as bidders on prime contracts. Instead, the Plan seeks to remedy the pattern of discrimination by prime contractors, as well as the local construction industry, which denied subcontracts to minority businesses and blocked their growth and development.

The purpose of affirmative action is to dismantle prior patterns of discrimination and to prevent discrimination in the future. *Local 28 of Sheet Metal Workers v EEOC,* ____ US ____, 106 S Ct 3019, 3049 (1986). In fashioning a complete remedy to prior discrimination, the government must take into account the underrepresentation of minorities in the relevant population, when that underrepresentation reflects a prior history of "purposeful exclusion." See *United Steelworkers v Weber,* 443 US 193, 212 (1979) (Blackmun, J., concurring); *see also,* discussion of *Weber* in *Johnson v Transportation Agency, Santa Clara County, California,* ____ US ____, 107 S Ct 1442, 1452-3 n. 10 (1987); and *Croson,* 822 F2d at 1365 n. 11 (Sprouse, J., dissenting).

As the Fourth Circuit observed in its original decision, "judging the set aside percentage by reference to the existing small proportion of MBE's in the economy" would tend to perpetuate, rather than dismantle, the prior pattern of discrimination. See *Croson*, 779 F2d 181, 191 (4th Cir, 1985), *vacated*, 106 S Ct 3327 (1986).

The City of Richmond had before it evidence that minority owned businesses had received only 0.67% of the City's construction contracts for the five year period 1978-1983. In addition, there was evidence that blacks constituted less than one percent of construction contractors in all crafts in the Richmond areas, which, in turn, reflected the history of racial exclusion from the industry in the nation as a whole. *Croson*, 822 F2d at 1363, 1364 at n. 8. (Sprouse, J., dissenting). There were no black members of the local contractors' association in Richmond. *Id.*, at 1365. The City, therefore, had a firm basis for believing that the same pattern of purposeful exclusion in the nation's construction industry, existed in the local construction industry as well. *Id.*, at 1364.

Richmond's remedial goal is designed to remedy that prior pattern of discrimination, which carried over to city contracts, by creating a demand for minority businesses within the same local industry that had previously excluded them and prevented their development. See *J. A. Croson Co v City of Richmond*, 779 F2d 181, 185 (4th Cir, 1985), *vacated and remanded*, ____ US ____, 106 S Ct 3327 (1986).

In achieving its remedial objective, Richmond's 30% subcontracting requirement does not unduly burden non-minority prime contractors. Non-minority contractors are not precluded from bidding on prime contracts. Under governing principles of public contract law, they are not de-

prived of any vested rights,[9] as in the case of layoffs. *See Wygant*, 106 S Ct at 1851 (Powell, J.). The Richmond Plan affects only future contracting *opportunities* for non-minority subcontractors, thereby diffusing the burden. *Id.*

It is obvious that the 30% subcontracting requirement does not attempt to achieve "racial balance" based on Richmond's 50% minority population. Given the June 30, 1988 expiration date of the Plan, the 30% goal assures "promptness in the administration of relief,"[10] as well as being a reasonable mid point level of remediation. See *Fullilove*, 448 US at 513-4 (Powell, J., concurring).

In *Fullilove*, the Court recognized the broad remedial powers of Congress under the Constitution to require local units of government to "set aside" 10% of federal funds for minority businesses on local public works projects in remedying "societal discrimination." *Fullilove*, 448 US at 477-8 and 483-4. While the Richmond Plan does not restrict itself to remedying discrimination by the governmental unit itself, neither does it paint with as board a brushstroke as Congress.

The Richmond Plan reaches only as far as the City's contracts reach—as far, too, as the City's affirmative obligations under the Fourteenth Amendment. To the extent that the City's contracts contributed to the maintenance of prior patterns of discrimination in the local construction industry, the

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[9]

Michigan law, *e.g.*, provides that bidders on public contracts have no vested rights in the prospective award of a public contract. See *City Communications, Inc v City of Detroit*, 650 F Supp 1570 (ED Mich, 1987); *Kasam v City of Sterling Heights*, 600 F Supp 1555 (ED Mich, 1985); *Malan Construction Corp v Board of County Road Commissioners*, 187 F Supp 937 (ED Mich, 1960).

[10]

See United States v Paradise, _____ US _____; 107 S Ct 1053, 1071 (1987).

Richmond Plan is a measured and appropriate remedial response, mandated by the Fourteenth Amendment.

CONCLUSION

Under the standards set out in *Fullilove*, the Richmond Minority Business Utilization Plan is within the scope of the City's governmental and constitutional authority to dismantle and remedy prior patterns of discrimination in city contracting. *Wygant* does not detract from that authority. The Plan, therefore, should be upheld under the Fourteenth Amendment.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA

THE INTEREST OF THE CITY AND COUNTY OF SAN FRANCISCO

On April 2, 1984, the City and County of San Francisco ("the City") enacted Chapter 12D of the San Francisco Administrative Code, known as the Minority/Women/Local Business Utilization Ordinance ("Chapter 12D"). Chapter 12D is an affirmative action ordinance that seeks to remedy identified past contracting practices of the City and County of San Francisco that were found to deny minority-owned and women-owned business enterprises ("MBEs" and WBEs" respectively)[1] effective participation in the City's contract award process.

[1] Chapter 12D also affords benefits to San Francisco based firms to offset economic disadvantages faced by local businesses that are not shared by nonlocal businesses.

The enactment of Chapter 12D was preceded by numerous investigations, studies and public hearings by the City's Human Rights Commission at the direction of San Francisco's legislative body, its Board of Supervisors ("the Board"). The Board also held public hearings and received written evidence before adopting Chapter 12D. Relying on the extensive evidence before it, the Board squarely and directly faced the conclusion that public and private discrimination had made it difficult if not impossible for MBE/WBEs to gain a foothold in the marketplace and compete for City contracts. Specifically, although MBEs constitute 33% and WBEs 25% of San Francisco's businesses, and although women constitute nearly 60% and minorities nearly 50% of the City's population, during two years studied, MBE and WBEs combined received less than 2.8% of the City's prime contracts. As to construction contracts, the evidence in the record before the Board was that MBEs had received only .034% of the City's prime contract dollars, although 30.59% of the prime construction contractors in San Francisco are minority. Other contracting practices such as insurance, bonding and fee requirements were also found to create effective obstacles to minority business participation in the City's contracts.

After closely examining the City's contracting procedures and policies, the Board concluded that the low levels of MBE/WBE participation in City contracting stemmed from procurement practices that perpetuate the present effects of past discrimination. Indeed, the Board admitted in its legislation that City procurement practices "have operated in the past, continue to exist and create an invidious form of discrimination against minorities and women who seek to operate businesses within the City and County of San Francisco." Chapter 12D, Section 12.D.2.7.(m).

Faced with a compelling need for affirmative action, the City embarked on a remedial business utilization program. In brief, Chapter 12D sets a goal of awarding 30% and 10% of City prime contract dollars to MBEs and WBEs respectively. MBEs and WBEs receive bidding preferences when competing for City contracts. Joint-ventures between MBEs and WBEs and nonminority/women businesses are also eligible to receive bidding

preferences. For certain construction contracts, Chapter 12D, like Richmond's Minority Business Utilization Plan, requires prime contractors to use good faith efforts to share a portion of their contract with MBE/WBE subcontractors.

Chapter 12D excludes no bidders from the City's prime contract business and does not guarantee that MBEs or WBEs will win contracts. The program is subject to continuing administrative review on a quarterly and annual basis, requires MBEs and WBEs to be certified, contains an expiration date and waiver provisions.

The Associated General Contractors of California and several general construction contractors challenged the provisions of Chapter 12D applicable to construction contracts. Their principal argument was that Chapter 12D violated the Equal Protection Clause of the United States Constitution by establishing a race and gender-conscious quota system in favor of MBEs and WBEs to the exclusion of nonMBE/WBEs. They contended that the bidding preferences precluded them from competing for City public construction projects on the same basis as MBE/WBEs.

In March 1987, a panel of the United States Court of Appeals for the Ninth Circuit rendered its decision on the contractors' claims. *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987) [petition for rehearing and suggestion for rehearing *en banc* pending since April 6, 1987]. Using a modified version of the strict scrutiny standard, the panel concluded that the MBE preferences violated the Equal Protection Clause. Using a mid-level standard of review, the appeals court upheld the WBE preferences as constitutionally permissible.

The Fourth Circuit Court of Appeals in *Croson v. City of Richmond*, 822 F.2d 1355, 1359 (4th Cir. 1987) cites the San Francisco case as support for its holding. The Fourth Circuit holds that Richmond's Minority Business Utilization Plan, like Chapter 12D, lacked an adequate evidentiary foundation. *Id.*, at 1357; *Associated General Contractors v. City and County of San Francisco*, 813 F.2d at 932-934.

A decision striking down or upholding Richmond's Minority Business Utilization Plan would have a direct bearing on Chapter 12D. Like Richmond, San Francisco has a paramount interest in the local legislative authority to fashion limited and reasonable race-conscious remedial measures to ensure that its local public contracting practices not perpetuate the effects of past discrimination. Accordingly, this brief amicus curiae is respectfully submitted in support of the City of Richmond.

SUMMARY OF ARGUMENT

In the instant appeal, this Court has the opportunity to answer a very important question facing municipalities nationwide: What type and quantum of evidence must a municipality produce to justify embarking on a race-conscious remedial business utilization program? In responding to this inquiry, this Court should reject the proposition that particularized local legislative findings of official or intentional discrimination against the benefited classes is a constitutional prerequisite to such programs. A ruling of this nature would virtually eliminate affirmative action programs.

Instead, this Court should focus on evidence that speaks to whether the municipality has a factual premise from which to conclude that city procurement practices deny minority-owned businesses effective participation in city contracting opportunities.

Applying this test in the instant appeal, this Court should uphold the decision to adopt the Minority Business Utilization Plan since the testimonial and statistical evidence before the Richmond City Council warranted a conclusion by that body that remedial affirmative action measures were necessary.

ARGUMENT

SOCIETAL DISCRIMINATION PLUS EVIDENCE THAT MINORITY-OWNED BUSINESSES HAVE BEEN DENIED EFFECTIVE PARTICIPATION IN PUBLIC CONTRACTING OPPORTUNITIES SHOULD BE SUFFICIENT TO JUSTIFY VOLUNTARY RACE-CONSCIOUS REMEDIAL ACTION.

As political subdivisions of the States, municipalities are duty bound to guarantee equal protection of the laws to all of their citizens. *See Wygant v. Jackson Board of Education*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring). Hence, municipalities have a compelling and substantial interest in addressing through affirmative action past or present racial discrimination in public employment and contracting. *See United States v. Paradise*, ____ U.S. ___, 107 S.Ct. 1053, 1065 (1987) (plurality opinion); *Wygant v. Jackson Board of Education*, 476 U.S. at 277 (plurality opinion); *see* and *cf. Fullilove v. Klutznick* 448 U.S. 448, 498, 515-516 (1980) (Powell, J., concurring). What is not clear is the type and quantum of evidence that a municipality must produce to ensure that it is acting to remedy past discrimination rather than engaging in affirmative action simply as a matter of social policy.

This Court has conveyed a clear message that valid remedial affirmative action programs may not be premised on "societal discrimination" *alone*.[2] *Wygant*, 476 U.S. at 274, 276 (plurality opinion; emphasis added); see also *id.*, at 288 (O'Connor, J. concurring); *Regents of University of California v. Bakke*, 438 U.S. 265, 307, 310 (1978) (opinion of Powell, J.); *see* and *cf. Fullilove*, 448 U.S. at 477-478 (opinion of Burger, C.J.). Beyond societal discrimination, what evidence a majority of this Court would accept as warranting race-conscious remedial action by a local actor is an open question. Resolution of this question is critical, since municipalities need guidance as to when and in what cases they may respond to charges that municipal con-

[2] The term "societal discrimination" refers to "discrimination not traceable to [the local government's] own actions . . ." *Wygant*, 476 U.S. at 288 (O'Connor, J., concurring).

tracting procedures have prevented minority-owned businesses from effectively competing for public contracting opportunities.

At present, a plurality of this Court has announced one test for assessing whether a municipality's procurement procedures discriminate against minority-owned firms. Quoting *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977), four members of this Court in *Wygant* indicated that a proper basis for showing prior discrimination is a significant statistical disparity between "the racial composition of [the school's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market." 476 U.S. at 275. Applied to the public contracting area, this test means that cities may compare the number of minority-owned contractors in the local community and the number of city contracts awarded to minority firms. *See Croson*, 822 F.2d at 1358, 1359. This formula cannot and should not be the sole means available for a municipality to justify remedial action. The City of Richmond based its decision to enact a remedial affirmative action ordinance on a different factual predicate than that suggested by the *Wygant* plurality. *Id.*, at 1364 (Sprouse, J., dissenting). Accordingly, in the instant appeal, this Court has the opportunity to answer the important question of what type and quantum of evidence is needed to warrant affirmative action in favor of minority-owned businesses.

In *Croson*, the Fourth Circuit suggested that a municipality must have "particularized findings" that it has engaged in discrimination. *Id.*, at 1358. In the opinion of the Fourth Circuit, a finding of past discrimination by Richmond against each of the ethnic groups listed in the ordinance is a prerequisite to remedial affirmative action measures in favor of those groups. *Id.*, at 1361. However, the Fourth Circuit apparently would accept only substantial and convincing evidence in support of this finding since the court was not impressed with the evidence upon which the Richmond City Council relied to adopt the Minority Business Utilization Plan. *Id.*, at 1360. The Fourth Circuit characterized the evidence as a "spurious statistical comparison" and "nearly weightless testimony". *See id.*, at 1359.

This Court should reject the Fourth Circuit's proposition. If allowed to stand, the practical impact of this ruling would be to foreclose the enactment of remedial affirmative action measures. The logical consequence of the Fourth Circuit's "substantial and convincing evidence" test is that Richmond would need to produce either independent third party witnesses or substantial documentary evidence clearly probative of racially discriminatory contracting practices or policies adopted or applied by the City of Richmond.

As Judge Sprouse states in his dissenting opinion, this kind of evidence is "hard to come by". *Id.*, at 1365. In the world of public contracting, bid protests and legal challenges on a variety of procedural and substantive grounds are common. *See* e.g., *Baja Contractors, Inc. v. City of Chicago*, 830 F.2d 667 (7th Cir. 1987); *City of Inglewood L.A. County Civic Center Auth. v. Superior Court*, 7 Cal.3d 861 (1972); *Stanley-Taylor Co. v. Board of Supervisors*, 135 Cal. 486 (1902). Experienced public officers know that their decisions and actions as to the award of any contract are subject to scrutiny and possible legal action by contractors. Any such officer who seeks to discriminate is likely to do so in ways that are less obvious. Even those decisionmakers whose awards have been racially motivated are unlikely to admit alllegations of discrimination. Under the Fourth Circuit test a city would need to have documentary or testimonial evidence of discriminatory intent.

Even if such evidence were available—which it seldom if ever is—few local legislative bodies would be willing to name the responsible department or employee in a remedial ordinance. This kind of admission would raise a host of other questions any local legislative body would be inclined to avoid. Among those issues is the public liability such admissions would effectively establish. Even legislators interested in remedying past wrongs will be understandably reluctant to create evidence for the next class action against the city they represent. As Justice O'Connor states in her concurring opinion in *Wygant*, 476 U.S. at 290:

> The imposition of a requirement that public [entities] make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would

> severely undermine public [entities'] incentive to meet voluntarily their civil rights obligations.

See also *id.*, at 304-305 (Marshall, J., dissenting).

In short, imposing upon municipalities a requirement that they admit wrongdoing before seeking to remedy discriminatory procurement practices will virtually eliminate affirmative action programs. The most probable result of this requirement is that municipalities will decline to engage in the type of extensive factual inquiry the Fourth Circuit supports. Consequently, municipalities will avoid correcting discriminatory contracting practices inherent in their procurement procedures.

We respectfully submit that the applicable test should be as follows: a municipality may embark on a remedial business affirmative action program in favor of minority-owned businesses after the municipality has studied racial discrimination in society and found a causal relationship between past discrimination and a present paucity of minority business participation in its contracts. This test would ensure that the local government has "sufficient evidence to justify the conclusion that there has been prior discrimination." *Wygant*, 476 U.S. at 277 (plurality opinion); *see* also *id.*, at 286 (O'Connor, J., concurring) "[A] remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that affirmative action is required." *Id.*

Under this test, relevant factors would include comparing the number of contracts or contract dollars awarded to minority-owned businesses and the number of minority contractors in the local community. *See id.*, at 275 (plurality opinion). However, statistical proof of this nature should not be a prerequisite to affirmative action measures. In some cases there may be valid reasons why these numbers are unavailable. This point is best illustrated by the facts of the instant case. Richmond cannot show discrimination by meeting the "contract vs. contractors" test because racial discrimination in the industry in question is precisely the cause of a small minority contractor pool. *Croson*, 822 F.2d at 1363, 1365 fn. 11 (Sprouse, J., dissenting).

Regardless of whether a municipality can rely on statistical data, remedial action should be permitted when based on other forms of reliable evidence such as investigations of city procurement practices and policies or testimony of contractors and city administrators as to the conditions in the industry affected. Moreover, local legislators must be able to draw from their own relevant personal experience and knowledge as to contracting opportunities within the city and the relevant business field. *See Fullilove*, 448 U.S. at 467, 477-478 (opinion of Burger, C.J.).

The Richmond City Council easily meets this test. As the dissenting opinion notes:

> The Council was satisfied that the pervasive discrimination existing in the nation's craft unions and construction businesses also existed in Richmond. Minority contractors had received only two-thirds of one percent of city construction contracts between 1978 and 1983, although the minority population of Richmond during this period was approximately fifty percent. *The Council was convinced that this disparity resulted from purposeful discrimination against minority contractors.*

Croson, 822 F.2d at 1364, emphasis added; see also *id.*, 1363, fn. 6 & 7. Hence, Richmond did not adopt remedial measures because it was fashionable or a good idea. Rather, the city first considered facts that minority-owned businesses had been "denied effective participation in public contracting opportunities" in Richmond. *See Fullilove*, 448 U.S. at 477-478. Only after hearing testimony and weighing the facts, did the Richmond City Council vote to adopt the Minority Business Utilization Plan.

CONCLUSION

Richmond's legislators had "a firm basis for believing that affirmative action is required." *See Wygant*, 476 U.S. at 286 (O'Connor, J., concurring). Accordingly, this Court should uphold the City Council's decision to enact Richmond's Minority Business Utilization Plan.

DATED: April 20, 1988.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE MARYLAND LEGISLATIVE BLACK CAUCUS AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

Whether the Equal Protection Clause compels a City Council or any state or local legislative body to admit it actually discriminated and compile findings in support of that admission as a predicate to enacting race conscious remedial legislation.

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BRIEF OF THE MARYLAND LEGISLATIVE BLACK CAUCUS AS AMICUS CURIAE IN SUPPORT OF APPELLANT

CONSENT OF THE PARTIES

Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE MARYLAND LEGISLATIVE BLACK CAUCUS

The Maryland Legislative Black Caucus ("MLBC" or "Amici") is a non-profit corporation organized under the laws of the State of Maryland. Its membership is comprised of the elected Black senators and delegates of the Maryland Legislative Assembly, and are as follows: Senator Decatur Trotter, Chairman, Prince George's County; Senator Clarence W. Blount, Baltimore City; Senator Nathan C. Irby, Jr., Baltimore City; Senator Troy F. Brailey, Baltimore City; Senator Albert R. Wynn, Prince

George's County; Senator Larry Young, Baltimore City; Delegate Elijah E. Cummings, Baltimore City; Delegate Ruth N. Kirk, Baltimore City; Delegate Tony Fulton, Baltimore City; Delegate Ralph M. Hughes, Baltimore City; Delegate Howard P. Rawlings, Baltimore City; Delegate Margaret H. Murphy, Baltimore City; Delegate Nathaniel T. Oaks, Baltimore City; Delegate Frank Boston, Baltimore City; Delegate Curtis S. Anderson, Baltimore City; Delegate Kenneth C. Montague, Jr., Baltimore City; Delegate Hattie N. Harrison, Baltimore City; Delegate Clarence Davis, Baltimore City; Delegate John W. Douglass, Baltimore City; Delegate Richard N. Dixon, Baltimore and Carroll Counties; Delegate Nathaniel Exum, Prince George's County; Delegate Sylvania W. Woods, Jr., Prince George's County; Delegate Ulysses Currie, Prince George's County; Delegate Juanita Miller, Prince George's County; Delegate Christine M. Jones, Prince George's County; Delegate Gloria Lawlah, Prince George's County; and Delegate John Jefferies, Baltimore City. MLBC was organized with the principle concern of legislatively protecting the civil rights of Maryland's Black citizens and eliminating discrimination throughout state and local government.

The MLBC is extremely concerned about the issues presented by this appeal because both the Fourteenth Amendment to the U.S. Constitution and the Maryland Constitution charge the State of Maryland with the duty to enforce the protections guaranteed by that amendment. Indeed, the resolution of these issues will have a direct bearing on whether the State of Maryland, its localities, and municipalities may voluntarily adopt remedial legislation aimed at eliminating the tragic legacy of racial discrimination.[1] Moreover, in the view of the MLBC,

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[1] See, e.g., Md. Code, State Finance and Procurement Article, Sec. 11-148(b).

set-aside legislation [2] such as that adopted by the City of Richmond provides one of the most constructive and effective means for minority businesses to establish their presence in the mainstream of American economic life.[3]

Figures revealing the lack of Black participation within the construction industry in Richmond, or, for that matter, the State of Maryland, cry out for assistance of the type provided by set-aside programs.[4] One of the primary

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[2] A "set-aside" program can require a majority prime contractor to award a certain percentage of his subcontracts or the total value of the contract to minority business. *See, e.g., J. A. Croson v. City of Richmond*, 822 F.2d 1355, 1356 (4th Cir. 1987). Another type of set-aside would reserve a certain percentage of public contracts to be bid on by minority businesses only. *See, e.g., Ohio Contractors Ass'n v. Keip*, 713 F.2d 167, 168-169 (6th Cir. 1983). At least one federal court has seen no constitutional or operational difference between the former program, which is similar to that upheld by the U.S. Supreme Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and the latter, which is more akin to a "sheltered market" program. *See, Ohio Contr. Assoc., supra*, 713 F.2d at 173. District of Columbia minority contracting law defines "sheltered market" as "a process whereby contracts or subcontracts are designated, before solicitation of bids, for limited competition from minority business enterprises on either a negotiated or competitive bid process." D.C. Code, Section 1-1142(8). For other types of set-aside programs. See, *South Florida Chapter of Associated General Contractors of America, Inc. v. Metropolitan Dade County*, 723 F.2d 846 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984); *Southwest Washington Chapter National Electrical Contractors Ass'n v. Pierce County*, 100 Wash.2d 109, 667 P.2d 1092 (Wash. 1983).

[3] Levinson, *A Study of Preferential Treatment: The Evolution of Minority Business Enterprise Assistance Programs*, 49 Geo. Wash. L. Rev. 61 (1980); and Controller General, *Minority Firms on Local Public Works Project—Mixed Results*, p. 9 (1979).

[4] See, Comment, *Minority Construction Contracts*, 12 Harv. C.R.-C.L.L. Rev. 693 n.3 (1977). ("Although discrimination against minority construction firms is difficult to document statistically, a number of studies have confirmed the existence of such discrimination. See, e.g., R. Clover, *Fostering Minority Enterprise in Construction* (April 1975) (Report for the Center for the Study of Human Resources, University of Texas, at Austin, on file with the

reasons for set-aside programs was best stated in a Department of Commerce report, which states:

> The purpose of [the Set-Aside] requirement, which was introduced by Congressman Parren Mitchell of Maryland, was to help eliminate discrimination in construction and related industries and to bring minority firms into the mainstream of those industries. The extent to which minority firms have been excluded from these industries in the past is illustrated by data from the 1972 Census of Construction Industries and the 1972 Survey of Minority-Owned Businesses. These reports reveal that minorities owned only 4.3 percent of the construction firms in operation in 1972. Furthermore, minorities received only one percent of the $164.5 billion earned by all construction firms in 1972. The figures are similar with respect to those industries that provide supplies and equipment for construction firms. Minority firms represented only 1.9 percent of the total number of establisments in the wholesale trade industry in 1972 and received only 0.3 percent of the gross receipts. Minority firms' participation in Federal construction procurement in 1977 was also disproportionately low, with such enterprises performing only 1.2 percent of Federal contracts. In addition, minority and female-owned firms received less than seven tenths of one percent of all contracting dollars spent by those state and local governments that responded to a 1973 U.S. Civil Rights Commission survey.[5]

Although the case before this Court does not directly address a state's authority to voluntarily remedy race

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Harvard Civil Rights-Civil Liberties Law Review); S. Taylor, *Catching Up: A Study of Behavior and Experiences of Minority Construction Contractors in Nine American Cities* (May 1973) (Report for the Charles F. Kettering Foundation, on file with the Harvard Civil Rights-Civil Liberties Law Review)").

[5] EDA, U.S. Dept. of Commerce, Local Public Works Program Interim Report: *Fostering the Development and Expansion of Minority Firms in Construction and Related Industries*, at 1 (Sept. 1978).

discrimination, how the Court decides this case will undoubtedly have an impact on the ability of the Maryland Legislative Assembly, or any state or local legislative body, to eradicate racial discrimination. It is for this and two other reasons that Amici seek to participate in this case.

First, Amici recognize from personal experience as legislators the need for clearly defined remedial measures to combat racial discrimination. The MLBC has sought to enact race conscious remedies at both the state and local level, but its efforts have been stifled by the lack of clarity from this Court. While some governmental bodies prefer voluntary (non-statutory) set-aside programs, such measures have repeatedly fallen short of their goals.[6] In contrast, mandatory set-aside legislation that compels such action produces substantial results and propels minority enterprises toward the economic mainstream.[7]

Second, the MLBC believes that the elimination of racial discrimination is of paramount importance to the State

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[6] See Memorandum of Office of Audits and Investigations, Prince George's County, Maryland, *Minority Contracting*, dated November 9, 1987; Office of Legislative Oversight, Montgomery County, Maryland, *A Description and Evaluation of the County and Bi-County Minority Procurement Utilization Programs* (R. No. 88-1) (1988); *Hearing on the Small Business Administration Sec. 8(a) Contract Procurement Program Before the Senate Committee on Small Business*, 94th Cong., 2d Sess. (1976); *Hearings on SBIC and SBLC Programs and Selected SBA Activities Before the Subcommittee on SBA Oversight and Minority Enterprises of the House Committee on Small Business*, 94th Cong., 1st Sess. (1976); *Oversight Hearings on Small Business Administration Programs and Activities Before the Subcommittee on SBA Oversight and Minority Enterprises of the House Committee on Small Business*, 94th Cong., 1st Sess. (1976); and *Hearings on Procurement Assistance Programs of the Small Business Administration Before the Senate Committee on Small Business*, 94th Cong., 1st Sess. (1975).

[7] See n.3, *supra*.

of Maryland as well as to society at large. To achieve this objective, state and local legislatures must have at their disposal a full range of race conscious remedies. The MLBC believes that if the Fourth Circuit's decision is allowed to stand, it would severely restrict the attempts of state and local legislatures to eradicate the lingering effects of prior discrimination. See e.g. *Michigan Road Builders Ass'n., Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987); *Assoc. Gen. Contr. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987) *rehearing denied*; *J. Edinger & Son v. City of Louisville*, 802 F.2d 213 (6th Cir. 1986). But see *H. K. Porter Co., Inc. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987).

Thus, the perspective which Amici intend to convey to this Court is that of a legislative body which is constitutionally charged with the responsibility of enforcing the Fourteenth Amendment through legislation.[8]

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[8] This Court has, in the past, recognized a constitutional *duty* on the part of the individual state governments, under whose authority the local governments act, to ". . . take *affirmative* steps to eliminate the continuing effects of past unconstitutional discrimination." *Wygant v. Jackson Board of Education*, —— U.S. ——, ——, 106 S. Ct. 1842, 1856 (1986) (emphasis added) (O'Connor, J., concurring in part and concurring in the judgment) citing as examples, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971); and *Green v. New Kent County School Board*, 391 U.S. 430, 437-38 (1968). For a view of how this recognition specifically affects Amici, see Maryland Constitution, Declaration of Rights, art. 24 (Equal Protection); see also *Hornbeck v. Somerset County Board of Education*, 295 Md. 597, 458 A.2d 758 (1983) (held that the Equal Protection Clause of the Fourteenth Amendment and equal treatment guaranteed by article 24 of the Maryland Constitution's Declaration of Rights were *in pari materia* and would most often be applied to the same extent); *State v. Good Samaritan Hospital*, 299 Md. 310, 473 A.2d 892, appeal dismissed, 469 U.S. 802 (1984) (equal protection embodied by article 24); and *Lawrence v. State*, 51 Md. App. 575, 444 A.2d 478 (1982), aff'd, 295 Md. 557, 457 A.2d 1127 (1983) (U.S. Supreme Court's interpretations of the Fourteenth Amendment act as authority for interpretation of article 24 of the Maryland Constitution).

STATEMENT OF THE CASE

Amicus curiae adopts the facts as presented in the Brief for the City of Richmond as well as its Statement of the Case.

SUMMARY OF ARGUMENT

For over thirty years since *Brown v. Board of Education*, 347 U.S. 483 (1954), this nation has chartered a direct course toward eradicating the vestiges of racial discrimination from every aspect of public and private life. In achieving this objective, this Court has consistently supported the concept that both public and private institutions should voluntarily seek to eliminate the effects of discrimination. And, while this Court has not spoken with a single voice as to what level of scrutiny should be applied to analyze the use of race conscious remedies, one thing is certain: racial equality should be facilitated in the least abrasive manner possible.

Recognizing the development of this fundamental national policy, the Fourth Circuit's decision erects a barrier that frustrates more than facilitates the achievement of racial equality. In effect, the court of appeals' decision extends the mandate of the Fourteenth Amendment and *Wygant* far beyond what this Court has actually required of a legislative body by holding that the constitutionality of a race conscious remedy turns on an admission of prior discrimination by the governmental body itself and the volume and specificity of those findings which support that admission. Neither the Constitution nor *Wygant* require a state or local legislature to admit that it has actually discriminated against minorities. Moreover, allowing the court of appeals' decision to stand will no doubt have a chilling effect upon the voluntary efforts of public and private institutions to eliminate racial discrimination within and without their spheres of influence.

When the court below reached its decision, it failed not only to consider the principles that were established in *Fullilove*, and later reiterated in *Johnson v. Transportation Agency, Santa Clara County, California*, —— U.S. ——, 107 S. Ct. 1442 (1987) but, also, to recognize the distinguishing characteristics of the legislative fact-finding process. See, e.g., Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. of Pa. L. Rev. 637, 640 (1966). As a result, the court of appeals was unable to discern the factual and institutional distinctions between the findings involved in *Wygant* and those of the Richmond City Council.

Finally, by requiring a legislative body to make findings of its own acts of discrimination the court below imposed on legislatures a findings requirement similar to that of a judicial or administrative body. By elevating legislative findings to such standards the decision unnecessarily results in an intrusion by the judiciary into the legislative process, thereby upsetting the balance of governmental powers in our nation. Such imposition presents a clear threat to the legislative process that this Court has on numerous occasions fought to prevent.

If the decision below is allowed to stand it would not only impede the achievement of an important public policy, that is, the elimination of racial discrimination, but would also begin to erode accepted separation of powers principles.

ARGUMENT

In a color-blind society, a "race conscious remedy" would have no application or meaning. See e.g., *Charlotte-Mecklenburg, supra*, 402 U.S. at 1, 28. Unfortunately, America's past has exemplified anything but a color-blind society.[9] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857); *Plessy v. Ferguson*, 163 U.S. 537, 559-60 (1896) (Harlan J., dissenting). "For black Americans, racial equality is a tradition without a past." Coleman, EQUALITY—NOT YET, N. Y. Times, July 13, 1981, at A15, Col.2. For over thirty years, since *Brown v. Board of Education, supra*, this Court, the Congress, the President, and the various branches of state and local governments have struggled to make racial equality a tradition.[10] The experience has not been without pain

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[9] See also U.S. Const. art. I, Sec. 2, cl. 3 (slaves relegated to status of three-fifths of a free human being); art. I, Sec. 9, cl. 1 (slavery not to be prohibited by Congressional act before 1808); art. IV, Sec. 22, cl. 3 (runaway slaves to be returned to state of slavery); Amendment XIII (1865) (slavery abolished, fifty-seven years after art. I, Sec. 9, cl. 3 made it possible); Amendment XIV (1868). (Due Process and Equal Protection clauses established with "one pervading purpose," that being ". . . the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him." *Butchers' Benevolent Ass'n v. Crescent City Livestock Landing & Slaughterhouse Co.* (The Slaughterhouse Cases), 16 U.S. (Wall.) 36, 71 (1873); Amendment XV (1870) (guaranteeing that disenfranchised Blacks not be denied the right to vote based upon "race, color, or previous condition of servitude); and Amendment XXIV (1964) (poll taxes abolished to ensure that disenfranchised Blacks not be denied the right to vote).

[10] See, e.g., Judicial Branch: *U.S. v. Paradise*, —— U.S. ——, 107 S. Ct. 1053 (1987); Executive Branch: Executive Orders 11246 (1965), 11375 (1967), 11518 (1970), 11625 (1971); Legislative Branch: Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000d *et seq.* (1976); Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e *et seq.* (1976); and State

and conflict. The Fourth Circuit's decision in *Croson* is no exception.

Instead of translating racial equality into a national policy in the least abrasive manner possible, the court below frustrates the process by creating tension between the legislative and judicial branches of government. The court of appeals accomplishes this obstruction by imposing more stringent fact-finding requirements on a legislative body than have ever been conceived by this Court. At the heart of the court of appeals analysis is a subliminal struggle to apply color-blind principles, despite this Court's previous holdings to the contrary.[11] The decision of the court below raises the very issue presented by all affirmative action cases, which is: how does our society reconcile the past with its egalitarian ideals.[12]

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and Local governments: *Ohio Contractors Ass'n, supra,* 713 F.2d 167 (1983), *Montgomery County v. Fields Road Corp.,* 282 Md. 575, 386 A.2d 344 (1978).

[11] See *Johnson, supra,* 107 S. Ct. at 1450 (Brennan, J., delivering the opinion of the Court) (restated prior findings of this Court in *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), that taking race into account was consistent with Title VII's objective of "break[ing] down old patterns of racial segregation and hierarchy." Citing *Weber, supra,* 443 U.S. at 208); *Regents of the University of California v. Bakke,* 438 U.S. 265, 287 (1978) (". . . Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment"); *Charlotte-Mecklenburg, supra,* 402 U.S. at 28 (" 'Racially neutral' assignment plans . . . may (be inadequate) . . . to counteract the continuing effects of past school segregation . . ."); and, *North Carolina State Board of Education v. Swann,* 402 U.S. 43, 46 (1971) ("Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."). See also *Korematsu v. United States,* 323 U.S. 214, 216 (1944) and *Lee v. Washington,* 390 U.S. 333, 334 (1968) (Black, Harlan, Stewart, J.J., concurring).

[12] This Court has on numerous occasions held that in order to achieve true racial equality, racially neutral remedies would be inadequate. See e.g., *Green, supra, McDaniel v. Barresi,* 402 U.S. 39 (1971); and *Charlotte-Mecklenburg, supra,* 402 U.S. at 28.

I. THE CITY OF RICHMOND MINORITY BUSINESS UTILIZATION PLAN DOES NOT VIOLATE THE EQUAL PROTECTION CAUSE.

To quote a well known constitutional scholar, Professor Laurence Tribe: "Race conscious remedies are now an accepted part of Fifth and Fourteenth Amendment jurisprudence." Laurence H. Tribe, *Constitutional Choices* (1985). The acceptance of race conscious remedies for past racial discrimination does not, however, resolve the question of what level of scrutiny is required to test their constitutionality. *Local 28, Sheet Metal Workers' International Association v. EEOC*, —— U.S. ——, 106 S. Ct. 3019, 3052 (1986) (opinion of Brennan, J.) *Wygant, supra*, 106 S. Ct. at 1852 (O'Connor, J., concurring); *Id.*, at 1867 n.7 (Marshall, J., dissenting). The only analytical agreement among members of this Court is that, when addressing "suspect classifications" such as race, judicial review of a challenge brought under the Equal Protection Clause requires a two-pronged analysis and that some level of heightened scrutiny is appropriate.[13] *Id.*, at 1852.

The first prong requires an inquiry into the governmental interest being vindicated. Inclusive within the first prong is a determination of whether the governmental entity adopting the race conscious remedy is competent to make findings of racial discrimination to establish a sufficiently important or compelling governmental interest. See *Paradise, supra*, 107 S. Ct. at 1064 n.17; *Wygant, supra*, 106 S. Ct. at 1846 (plurality opinion);

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[13] Although Amici do not concede that affirmative action programs should be subjected to strict scrutiny, the Richmond Plan survives even the strictest scrutiny. See e.g., *Paradise, supra*, 107 S. Ct. at 1064 Sec. n.17 (1987) (plurality opinion); *Sheet Metal Workers, supra*, 106 S. Ct. at 3052-53 (plurality opinion); *Bakke, supra*, 438 U.S. at 357-63 (Brennan, J., concurring in part and dissenting in part). Amici submits, however, that the intermediate level of scrutiny, which was endorsed by several members of this Court in *Bakke* and subsequent cases, should apply to affirmative action programs.

Id., at 1853 (O'Connor, J. concurring); *Id.*, at 1861-62 (Marshall, J. dissenting) *Id.*, at 1867-68 (Stevens, J. dissenting); *Sheet Metal Workers, supra*, 106 S. Ct. at 3034, 3050 (pluarity opinion); and *Id.*, at 3055 (Powell, J. concurring).

The second prong of the equal protection analysis focuses on whether the means chosen are sufficiently related to effectuating the governmental interest. *Paradise, supra*, 107 S. Ct. at 1064 (plurality opinion); *Sheet Metal Workers, supra*, 106 S. Ct. at 3052-53 (plurality opinion). This Court has established that race conscious relief need not be limited to victims of prior discrimination, and that "innocent persons may be called upon to bear some of the burden of the remedy." *Wygant, supra*, 106 S. Ct. at 1853-54 (opinion of O'Connor, J); *Id.*, at 1863 (opinion of Marshall, J.); *Id.*, at 1867-68 (opinion of Stevens, J.); *Id.*, at 1850 (opinion of Powell, J.); see also *Sheet Metal Workers, supra*, 106 S. Ct. at 3052-53 (opinion of Brennan, J.); and *Id.*, at 3054-57 (opinion of Powell, J.). These few established principles in what has become a complex area of the law are now jeopardized by the Fourth Circuit's decision in this case.

The Fourth Circuit's interpretation of *Wygant* makes unreasonable demands of a state or local government seeking to eradicate prior racial discrimination. First, the court below would require a governmental body to specifically admit or concede that it had affirmatively engaged in discriminatory practices. This requirement has been specifically criticized by members of this Court in *Wygant* and other decisions.[14] *Wygant, supra*, 106 S. Ct.

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[14] In her separate opinion in *Wygant*, Justice O'Connor discussed the chilling effect that such a requirement would exert upon voluntary compliance by governmental bodies acting as public employers. To quote Justice O'Connor:

> . . . [A] requirement that public employers make findings that they have engaged in illegal discrimination . . . would severely

at 1855. The court of appeals' decision would have the practical effect of not only discouraging enforcement of the Fourteenth Amendment, but also severely curtailing the power of legislative bodies to combat racial discrimination since the legislative process is not particularly well suited for such individualized findings.[15] Second,

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> undermine public employers' incentive to meet voluntarily their civil rights obligations . . . .

Wygant, supra, 106 S. Ct. at 1855 (O'Connor, J., concurring in part and concurring in the judgment). See also n.20, *infra*. Justice O'Connor reaffirmed her position in a separate opinion to this Court's decision in *Johnson* when she stated in reference to affirmative action plans under a Title VII analysis, that:

> . . . neither *Wygant* nor *Weber* places a burden on employers to prove that they actually discriminated against women or minorities [before enacting a voluntary remedial plan].

and that

> . . . [Because] this Court has long emphasized the importance of voluntary efforts to eliminate discrimination . . . a contemporaneous finding of discrimination should not be required.

Johnson, supra, 107 S. Ct. at 1463 (O'Connor, J., concurring in the judgment). This recognition of the potentially stifling effect which such a strict requirement would have on voluntary remedial action by public bodies is also addressed in the context of school desegregation by other members of the Court in *Wygant* in the following manner:

> The real irony of the argument urging mandatory, formal findings of discrimination lies in its complete disregard for a longstanding goal of civil rights reform, that of integrating schools without taking every school system to court.

Wygant, supra, 106 S. Ct. at 1863 (Marshall, J., with whom Brennan and Blackmun, J. J., join dissenting). See also, e.g., *Johnson, supra*, 107 S. Ct. at 1451 n.8, and 1457; *Weber, supra*, 443 U.S. at 204; and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

[15] *Fullilove, supra*, 448 U.S. at 503 (Powell, J., concurring) (legislative bodies have a "broader mission to investigate and consider all facts and opinions that may be relevant . . ."). See also *Katzenbach v. Morgan*, 384 U.S. 641, 668-69 (1966) (Harlan, J., whom Stewart, J., joins, dissenting) (provides examples of the general

the Fourth Circuit further misapplied *Wygant* by holding that the Richmond Plan was not sufficiently "narrowly tailored" to meet its remedial goal.[16] If the court of appeals decision is allowed to stand it would so narrowly tailor race conscious remedies as to render such remedies ineffective, despite this nation's commitment to making racial equality a tradition.

As part of the legislative process, Amici believe that the Fourth Circuit's decision effected an unprecedented burden upon legislative bodies not contemplated by this Court in *Wygant* nor by the framers of the Fourteenth Amendment. Because of the unprecedented barriers to the implementation of affirmative action programs created by the court of appeals' decision, Amici will focus their attention on the first prong of the court of appeals' decision.[17]

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scope of legislative fact-finding); and Note, *The Constitutionality of Affirmative Action in Public Employment: Judicial Deference to Certain Politically Responsible Bodies*, 67 Va. L. Rev. 1235, 1240-41 (1986) (legislative body conducts fact-finding "subject to political constraints").

[16] In determining whether race conscious remedies are appropriately tailored, this Court has examined such factors as the necessity for relief, the flexibility and duration of the relief, the relationship of any numerical goals to the relevant labor market, and the impact on non-minorities. See, *Sheet Metal Workers, supra*, 106 S. Ct. at 3052-53 (opinion of Brennan, J.); *Id.*, at 3054-55 (opinion of Powell, J.); *Wygant, supra*, 106 S. Ct. at 1850-52 (opinion of Powell, J.); *Id.*, at 1857; *Id.*, at 1857-58 (White, J., concurring in judgment); *Id.*, at 1864-65 (Marshall, J., dissenting); *Id.*, at 1869-71 (Stevens, J., dissenting).

[17] Amici have chosen to focus on the Fourth Circuit's implementation of the first prong of its equal protection analysis because that use strikes at the very heart of the legislative process. Amici do not, however, concede the correctness of the court of appeals' usage as to the second prong of its equal protection analysis. Amici therefore defers to the views of the City of Richmond and other supportive amici, who more than adequately address the court of appeals' analysis of the second prong.

A. The Equal Protection Clause does not require a governmental unit that voluntarily seeks to eliminate the effects of racial discrimination to admit or concede it actually engaged in discriminatory practices.

The Fourth Circuit decision would essentially require every state or local legislative body to find that it had actually discriminated before implementing a race conscious remedy. The court of appeals' conclusion radically expands *Wygant* and the Fourteenth Amendment far beyond what this Court intended and is without precedent.

According to the Fourth Circuit's interpretation of this Court's decision in *Wygant*, before a governmental interest in a racial preference can be accepted as "compelling," "there must be findings of prior discrimination." *Croson, supra*, 822 F.2d at 1358. Moreover, these findings must be predicated on more than societal discrimination, instead they must concern prior discrimination "by the government unit involved." *Id.*, citing *Wygant, supra*, 106 S. Ct. at 1847. Against this background, the court of appeals found the Richmond City Council's findings seriously wanting and without foundation for establishing a compelling interest which would justify the use of racial classifications in its contracting program. The ruling by the court of appeals, however, totally ignores the principles established in *Fullilove*, which was decided by this Court prior to *Wygant, supra*.

The requirements of finding discrimination and the corresponding authority or competence to engage in such remedial action were first raised by Justice Powell in *Bakke*[18] and, later, more specifically addressed in *Fullilove*, when he said:

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[18] In *Bakke*, Justice Powell stated that a governmental race conscious remedy is only constitutional if a "competent" body makes sufficient "findings" of past discrimination justifying such program. He concluded that the Board of Regents of the University of California was not competent to address societal discrimination, nor

> . . . The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body. 448 U.S. at 515-16 n.14.

Justice Powell declined to answer the question he posed in *Fullilove* as to what degree of factual specificity is required to justify the use of race conscious remedies. One court has noted that "there is no consensus on what findings of past discrimination justify remedial affirmative action." *Valentine v. Smith*, 654 F.2d 503, 509 (8th Cir. 1981). And, it was in this void that the court below sought to establish standards that exceeded those in both *Wygant* and *Fullilove*.[19] A close examination of past affirmative action cases and particularly *Fullilove* reveals, however, that the degree of findings necessary for a legislative body[20] to demonstrate a compelling government interest is not as rigorous as the court of appeals would have us accept.

In *Fullilove*, this Court ruled on the power of Congress to adopt a "Minority Business Enterprise" (MBE) pro-

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did it make adequately specific findings to support its affirmative action program. *Bakke, supra*, 438 U.S. at 307-10 (opinion of Powell, J.).

[19] The court of appeals cited *Valentine v. Smith, supra, Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894 (3rd Cir. 1984), and *Metropolitan Dade County, supra* as examples of local governmental bodies making adequate findings of discrimination, thereby implying acceptance of the Richmond City Council's competence to make findings of discrimination.

[20] This Court has determined in *Fullilove, supra*, 448 U.S. at 478, that Congress has the competence to make such findings. In *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), this Court determined that federal courts were also competent to make findings. In *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *McDaniel v. Barresi, supra*; and *Railway Mail Association v. Corsi*, 326 U.S. 88 (1945) this Court held that states are also competent. And, in *Metropolitan Dade County*, supra this Court signaled that local city or county councils are also competent to make findings of discrimination.

vision of the Public Works Employment Act of 1977.[21] That program was not unlike the Richmond Plan and others. In upholding the constitutionality of the MBE provision, this Court approved Congress' findings of past discrimination even though it had failed to make "specific factual findings" of statutory or constitutional violations. *Fullilove, supra,* 448 U.S. at 478. Indeed, the findings that Congress did make presented no clear and specific evidence of racial discrimination by the federal government in the disbursement of federal contracting funds. See, *Id.*, at 527 (Stewart J., dissenting). Interestingly, even Justice Powell implicitly ignored his own "specific findings" requirement by expressly adopting that portion of Chief Justice Burger's opinion that endorsed Congress' findings. *Id.*, at 453, 495.[22] Moreover, Justice Powell and Chief Justice Burger found that the low number of public contracts awarded minority businesses contained in the legislative history of the MBE provision, was sufficient to justify Congress' remedial action. *Id.*, at 456-67 (opinion of Burger, C. J.); *Id.*, at 502-06 (Powell, J., concurring). Implicit in this Court's *Fullilove* decision was the reestablishment of the principle that race conscious remedies need not be dependent on finding the government guilty of discrimination, but instead they must be directed at remedying the effects of discrimination within the particular governmental entity's sphere of influence. This principle, which was set forth in *Fullilove* is not foreign,[23] and it later resurfaced in *Johnson, supra.*

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[21] Pub. L. No. 95-28, 91 Stat. 116 (codified at 42 U.S.C. & 6705(f)(2) (Supp. III 1979).

[22] See also, *The Supreme Court Review,* 1979 Term—94 Harv. L. Rev. 75, 133 (1980).

[23] Even prior to *Bakke,* there were several instances of judicial approval of programs that used racial classifications to ameliorate perceived discrimination, although actual prior discrimination had not been judicially ascertained. Moreover, even consent decrees have been issued to authorize race conscious remedies prior to making specific findings of past discrimination. See e.g., *Califano v. Webster,* 430 U.S. 313 (1977); *Schlesinger v. Ballard,* 419 U.S. 498

In *Johnson*, this Court held that a public employer need not show that it had discriminated as a predicate to instituting a voluntary affirmative action plan when challenged under Title VII of the Civil Rights Act of 1964. *Johnson, supra*, 107 S. Ct. at 1451. While a somewhat different standard of scrutiny is imposed under the Equal Protection Clause than under Title VII, the objective of both is the same, the eradication of racial discrimination.[24] Moreover, the same reason advanced in *Johnson* for not requiring evidence of past discrimination, was advanced in *Wygant* as well by Justice O'Connor;[25] in *Bakke* by Justices Brennan, White, Marshall, and Blackmun;[26]

(1975); *United States v. Wood Wire & Metal Lathers Int'l. Union, Local Union No. 46*, 471 F.2d 408 (2nd Cir.), *cert. denied*, 412 U.S. 939 (1973). See also, *Katzenbach v. Morgan, supra*, Larson, *Race Consciousness in Employment After Bakke*, 14 Harv. C.R.-C.L.L. Rev. 215, 235 (1979); Comment, *Reverse Discrimination: The Supreme Court Defines a Significant Limitation on the Permissible use of Race in Affirmative Action*, 26 Washburn L.J. 618, 622 (1987).

[24] Justice Scalia, in *Johnson* joined by Chief Justice Burger and Justice White, acknowledged this point when he said that: "it is most unlikely that Title VII was intended to place a *lesser* restraint on discrimination by public actors than is established by the Constitution." 107 S. Ct. at 1442 (Scalia, J., dissenting) (emphasis in original). Justice O'Connor in *Johnson* also acknowledged that "the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause." *Id.*, at 1461 (O'Connor, J., concurring). And, in *Paradise, supra*, 107 S. Ct. at 1075 n.1, Justice Powell implied that the standards of analysis in Title VII and equal protection cases are similar, though not identical.

[25] See, *supra*, note 14.

[26] *Bakke, supra*, 438 U.S. at 364 (opinion of Brennan, White, Marshall, and Blackmun, J.J.) ". . . the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial action . . . would severely undermine efforts to achieve voluntary compliance with the requirements of law").

and finally in *Weber* by Justice Blackmun.[27] Both *Fullilove* and *Johnson* clearly established that neither a public nor private entity need admit its guilt or participation in discrimination as a predicate to establishing race conscious remedies. This Court realized that to establish such requirements would have a chilling effect on achieving the purposes of the Equal Protection Clause and Title VII. To the extent that findings are required, *Fullilove* only required that there be a relationship between the remedy and the discrimination being cured, and that the discrimination being cured be more than societal discrimination. Despite this Court recognizing the problems inherent in admitting past discrimination, the court of appeals failed to recognize these concerns.

In fact, while the court below seemed to implicitly acknowledge Justice O'Connor's concerns in *Wygant*, about the inherent problems presented by the findings requirement, it disregarded those concerns and instead placed heavy reliance on the following language of the plurality opinion:

> This Court has never held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination. *Wygant, supra*, 106 S. Ct. at 1847 (plurality opinion).

In relying on this language the court below totally misapplied the intent of *Wygant*. In *Wygant* a plurality of this Court held that societal discrimination alone was insufficient to justify race conscious remedies. *Id.*, at 1847-48. The court of appeals, after examining how

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[27] *Weber, supra*, 443 U.S. at 210 (Blackmun, J., concurring) (". . . voluntary compliance with Title VII . . . [places an employer] . . . in profound jeopardy . . . [in which the only way to protect themselves is] . . . to eschew all forms of voluntary affirmative action").

the Richmond City Council conducted its findings, concluded that societal discrimination was the only basis for enacting the Richmond Plan. The court below reached this conclusion despite the Richmond City Council having held a hearing, heard testimony, and drawn on its own experience [28] and that of Congress,[29] to reach its findings. The cumulative result of these findings revealed the existence of purposeful discrimination within the construction industry, and the City of Richmond's passive participation in such discrimination by its awarding of

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[28] As this Court is well aware, the City of Richmond has experienced on numerous occasions the need to eradicate racial barriers within its government and the community at large. *See e.g., City of Richmond v. United States*, 422 U.S. 358 (1975) (this case focused on the city's annexation plan relative to its compliance with the Voting Rights Act); *Bradley v. School Board*, 462 F.2d 1058, 1065 (4th Cir. 1972) (en banc) (this case involved school desegregation, where it was found that the city tended to "perpetuate apartheid of the races"); aff'd by an equally divided Court, 412 U.S. 92 (1973) (per curiam).

[29] In relying on Congress' findings that: "there was direct evidence . . . that . . . discrimination existed with respect to state and local construction contracting as well . . .", the City Council was drawing upon a wide array of sources to reach its conclusion. The use of other sources of information to supplement a governmental entity's own peculiar findings was recently upheld in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986). In *City of Renton*, this Court held that a city's "substantial governmental interest" in regulating the time, place, or manner of protected speech may be established by findings and studies generated by other cities, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 51-51. Further support for such "borrowing" has also begun to gain acceptance from the academic community. See Days, *Fullilove* 96 Yale L. J. 453, 480 (1987) (the author in analyzing the necessity for findings states: "State and local agencies creating set-asides should, for example, be able to rely in part from federal legislative or agency findings and judicial determinations regarding nationwide discrimination against minority business enterprises as predicates for considering the propriety of set-asides in their respective jurisdictions").

construction contracts to that industry.[30] In *Wygant* the Board of Education of Jackson, Michigan made no such findings, particularly of the degree accomplished by the Richmond City Council.

This Court found in *Wygant* that the Jackson Board of Education's race conscious layoff plan was seriously wanting because it relied solely on a role model theory. *Wygant, supra*, 106 S. Ct. at 1848. Implicit in the use of the role model theory was reliance on the raw use of statistics. When these statistics were closely scrutinized by this Court it concluded that there was no additional evidence to show that the disparity between the percentage of minority students and the percentage of minority faculty was the result of prior discrimination by the Board. *Id.*, at 1848 (opinion by Powell, J., joined by Burger, C. J., and Rehnquist, J.); see also, *Id.*, at 1854 (O'Connor, J., concurring in the judgment). In essence, the factual support for the Richmond Plan was far more probative than that revealed in *Wygant*. Thus, the factual predicate established by the Richmond City Council was more than adequate to support the adoption of the Richmond Plan. Indeed, the facts revealed by the Richmond City Council are inapposite to *Wygant*, and therefore rob the court of appeals' decision of any basis for support.

B. The holding below unnecessarily imposes on every legislative body seeking to voluntarily remedy racial discrimination the same fact finding standards as are imposed on judicial and administrative bodies, and therefore strains the balance of powers between the judicial and legislative bodies of government at every level.

While the Fourth Circuit acknowledges that the Richmond City Council should not be held to as rigorous a findings standard as a federal district court, its evalua-

[30] The district court agreed with the City Council's findings, after it had heard all of the facts.

tion of the City Council's findings suggests otherwise.[31] How the court of appeals evaluated the Richmond City Council's findings dramatically illustrates the imposition of judicial standards on a legislative body. This judicial imposition is, beyond question, an encroachment upon the legislative branch and can only lead to severe disruption of the balance of power between the judiciary and legislature. See *Fullilove, supra*, 448 U.S. at 503 (Powell, J., concurring). This is particularly true in the area of race conscious remedies where the coordination of the branches at every level of government is extremely critical. This concern was not lost on Justice Powell in *Fullilove.*

In *Fullilove*, the petitioners contended that the legislative history of the Public Works Employment Act of 1977 ("PWEA") reflected no findings of statutory or constitutional violations. *Id.*, at 502. In response, Justice Powell said:

> Congress is not an adjudicatory body called upon to resolve specific disputes between competing adversaries. Its constitutional role is to be representative rather than impartial, to make policy rather than to apply settled principles of law. The petitioners' contention that this Court should treat the debates on Sec. 103(f)(2) as the complete "record" of congressional decision making underlying that statute is essentially a plea that we treat Congress as if it were a lower federal court. But Congress is not expected to act as though it were duty bound to find facts and make conclusions of law. The creation of national rules for the governance of our society simply does not entail the same concept of record-making that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate

[31] *Croson, supra*, 822 F.2d at 1359.

> and consider all facts and opinions that may be relevant to the resolution of an issue. *Id.*, at 502-03.

He further states:

> Acceptance of petitioners' argument would force Congress to make specific factual findings with respect to each legislative action. Such a requirement would mark an unprecedented imposition of adjudicatory procedures upon a coordinate branch of Government. Neither the Constitution nor our democratic tradition warrants such a constraint on the legislative process. I therefore conclude that we are not confined in this case to an examination of the legislative history of Sec. 103 (f) (2) alone. Rather, we properly may examine the total contemporary record of congressional action dealing with the problems of racial discrimination against minority business enterprises. *Id.*, at 503.

The significance of Justice Powell's view is that he also recognized the evils in allowing courts to encroach upon the legislative fact finding process. And, while his opinion in *Fullilove* may at first glance appear limited to Congress, upon closer scrutiny it appears to reflect a belief that legislative bodies are more competent than courts in making findings of broad-scale discrimination. The proposition that courts should give deference to legislative findings is not without some basis in precedent.[32]

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[32] See, Comment, *The Constitutionality of Affirmative Action in Public Employment: Judicial Deference to Certain Politically Responsible Bodies, supra* (the thrust of the Comment is that under Justice Powell's analysis of equal protection, courts should defer to findings of discrimination by legislative bodies who are accountable to the electorate, but should scrutinize findings of discrimination by isolated public bodies). Cf. Notes, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 Yale L. J. 1403 (1982) (the Note essentially agrees with the idea of judicial deference to findings of discrimination by Congress, but would apply a stricter standard of scrutiny on state and local governments, respectively, on the theory that the federal government is a better protector of minority rights than lower levels of government). See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981) ("it is not the

Justice Powell's concern for maintaining a balance between the judiciary and the legislative branch was not lost on other members of this Court. Even more important than the respect accorded the legislature by this Court, however, is the constitutional principle of the separation of powers.

The Constitution does not require a legislature to conduct hearings, build a record, and make formal findings when it passes a law. *Perez v. United States*, 402 U.S. 146, 156-157 (1971); *Oregon v. Mitchell*, 400 U.S. 112, 147 (1970) (Douglas, J., concurring in part and dissenting in part); *Katzenbach v. McClung*, 379 U.S. 244, 299 (1964); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937); *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915) (Holmes, J.). The rule derives from basic separation of powers principles embodied in the Constitution.

This Court has uniformly held that a statute "will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S.

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function of the courts to substitute their evaluation of legislative facts for that of the legislature"). See also, *Id.*, at 468-70. But, see *Id.*, at 478 n.2 (Stevens, J., dissenting). Politically responsible legislative bodies are better suited to correcting broad-scale discrimination than courts for two reasons: First, broad-scale societal discrimination is often not provable according to judicial standards. Second, the number of parties involved in a determination of prior widespread discrimination would impose a strain on court procedures: even a class action lawsuit might be difficult to conduct, and furthermore, a class action would not be proper if individual claims differed widely. See, *Vance v. Bradley*, 440 U.S. 93, 111 (1979); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952). See also, *Local 35, IBEW v. City of Hartford*, 625 F.2d 416 (2nd Cir. 1980) (the Sixth Circuit upheld an affirmative action ordinance adopted by the City Council of Hartford, Connecticut). *Cf. Detroit Police Officers' Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981) (the court of appeals rejected the district court's failure to accept the findings of minority under-representation by a Board of Police Commissioners).

420, 426 (1961); *James v. Strange*, 407 U.S. 128, 133 (1972). In the absence of any legislative history, both the existence of facts supporting the legislature's judgment and its awareness of those facts will be presumed. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938); *Carmichael*, *supra*, at 509-10. Indeed, even if the resulting statute is constitutionally supportable, and the legislative history or other evidence indicate that Congress may have acted for improper reasons, this Court found it to be constitutionally irrelevant.[33] While this Court has not necessarily adhered to these long standing principles when addressing suspect classifications it has not totally disregarded the rationale underlying the principles. In essence, these cases establish a principle that as long as a legislative body acts within the scope of its constitutional powers it is not the province of this Court to instruct it on the kind of hearings it must hold or the "findings" it must make. As such Amici submits that where race conscious remedial legislation is involved, deference should remain the rule until a party can prove that it has been impermissibly discriminated against by the legislation. In this instant the appellee failed to establish on all levels impermissable discrimination. See, *Wyant*, *supra*, 106 S. Ct. at 1853-54. By placing the initial burden on the legislature, however, the decision below allows for groundless claims to stifle the legislative process, and involves the courts in legislative judgments.

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[33] See, e.g., *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislation. . . . It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it."); *Barenblatt v. United States*, 360 U.S. 109, 132 (1959) ("So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power").

While the judgments of Congress, as opposed to those of a city council or a state legislature, are accorded particular deference, courts do not have carte blanche authority to second-guess state and local legislative judgments. *Vance, supra; Ferguson v. Skrupa*, 372 U.S. 726 (1963) *Day-Brite, supra.* Judicial restraint in the review of state or local statutes or ordinances follows naturally from the realization that courts are not representative bodies. *Alfange, supra*, at 640-41). As Justice Frankfurter noted, courts "are not designed to be a good reflex of a democratic society." *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring). See also, L. Hand, *The Bill of Rights*, 11-18 (1958); A. Bickel, *The Least Dangerous Branch* (1962). In reviewing civil rights legislation, this Court has often recognized the competence of state or local governments to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures. *Johnson, supra; Paradise, supra; Bakke, supra* at 302 n.41 (Powell, J.); *Katzenbach v. Morgan, supra*, at 648-653; *South Carolina v. Katzenbach, supra*, at 325-27; and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

Respect for the democratic process and the separation of powers is not the only reason courts do not require legislatures to hold hearings or make detailed findings:

> The principle [of separation of power] is not merely one of deference to Congress or the states. It rests upon appreciation of the fact that the fundamental basis for legislative action is the knowledge, experience, and judgment of the people's representatives only a small part, or even none, of which may come from the hearings and reports of committees or debates upon the floor. Cox, *The Supreme Court, 1965 Term-Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91, 105 (1966).

Legislatures are not courts. Courts develop law through reason derived from precedent. They are a reactive body, deciding only those cases and controversies before them on the basis of a record generally supplied by the parties. Legislatures, by contrast, create laws through a process of bargaining and compromise. They are by their very nature a diverse body whose task it is to make laws that may not please members of the judiciary or the public, but stand nonetheless as expressions of the will of the electorate. A legislature acts affirmatively, drawing information and ideas not merely from hearings, debates, and committee reports but also from constituents, interest groups, and the executive branch. Fisher, *Constitutional Interpretation By Members of Congress*, 63 N.C.L. Rev. 707 (1985). "In the nature of the case [a legislature] cannot record a complete catalog of the considerations which move its members to enact laws." *Carmichael, supra*, at 301 U.S. at 510.

Lumping legislative determinations with administrative and judicial findings is therefore inappropriate. Legislative bodies cannot be expected to conduct themselves like courts because they were not created to function as such. *Fullilove, supra*, 448 U.S. at 503 (Powell, J., concurring). Imposing judicial formalities upon legislatures will not insure the integrity of legislation. Requiring a state or local government to produce detailed findings prior to enacting legislation could only result in undesired consequences. Amici believe that one of the side-effects of the court of appeals' decision is that it will force legislatures to focus attention and financial resources on the preparation of legislative findings, rather than more careful consideration of the text of pending legislation. Such detailed findings can only lead to more involvement of the courts in trying to ascertain the genuineness of the legislation.

Justice Powell concluded in *Fullilove*, that requiring Congress to make more specific findings would put an unwarranted "constraint on the legislative process." *Id.*, at 503. This Court and various scholars have on numerous occasions recognized the need for maintaining a balance between the judicial and legislative branches. Karst, *Legislative Facts in Constitutional Litigation*, Supreme Court Review 75 (1960). This respect for separation of powers principles and concern for burdening the legislative process was entirely lost on the court of appeals.

CONCLUSION

For the several reasons presented above, the judgment below must be reversed.

Respectfully submitted,

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CITY OF RICHMOND,

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BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NOW LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF THE APPELLANT

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INTEREST OF *AMICI CURIAE* [1]

The five *amici curiae* who submit this brief [2] have often appeared in this Court, both as *amici* and on behalf of minorities and women, in civil rights cases involving discrimination in voting, education, employment and housing. They have a direct interest in supporting the principle that, consistent with the Equal Protection Clause, state and local governments may establish reme-

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[1] Pursuant to Rule 36.2, written consents of the parties to the submission of this brief have been filed with the Clerk of the Court.

[2] A description of each amicus organization is set forth in Appendix No. 1.

dial programs to eradicate discrimination and the continuing effects of prior discrimination. The experience of the *amici* in a broad range of discrimination and affirmative action litigation may enable *amici* to illuminate for the Court some of the issues presented by this case.

STATEMENT OF THE CASE

This case involves the constitutionality of the Minority Business Utilization Plan adopted by the City of Richmond.[3] We generally adopt the statement of the case provided by Richmond in its brief. What follows represents an amplified description of the City Council proceedings leading to adoption of the plan.

In 1977, the Congress adopted a Minority Business Enterprise ("MBE") set-aside plan as part of the Public Works Employment Act of 1977. 42 U.S.C. § 6705(f)(2) (1982). This statute required state and local government applicants for federal public works funds to guarantee that 10% of the funds would be expended through MBEs. Shortly thereafter, this Court upheld against constitutional challenge Congress' choice of the MBE plan "to ensure that [minority firms] were not denied equal opportunity to participate in federal grants to state and local governments . . . ." *Fullilove* v. *Klutznick*, 448 U.S. 448, 478 (1980) (plurality).

Following the national lead, the Richmond City Council undertook an examination of the exclusion of minorities from participation in its own public contracting. Council members had been concerned about minority participation in public contracting for some time. Votes on a remedial set-aside at two meetings were postponed allowing further research and analysis. J.A. 25-27.

During the postponements, council members, city administrators and the city attorney worked on the matter

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[3] Minority Business Utilization Plan, § 27.10-20, art. VIII-A, Richmond, Va., Ordinance 83.69-59 (April 11, 1983) (hereinafter "ordinance" or "plan"). Reproduced in Supplemental Appendices to the Jurisdictional Statement. J.S. Supp. App. 233-58.

over "a number of sessions." J.A. 26-27. Their work included review of city construction contracts for the previous five-year period and analysis of *Fullilove* and other decisions passing on the legality of set-aside programs of various configurations. J.A. 14-16, 24-27, 43. On April 11, 1983, after hearing and public debate, the Council adopted the Minority Business Utilization Plan.[4]

The City Council's purpose in enacting the ordinance was explicitly "remedial . . . for the purpose or [sic] promoting wider participation by minority business enterprises in the construction of public projects, either as general contractors or subcontractors."[5] Councilman Henry Marsh, a sponsor of the ordinance, stated, in urging adoption of the set-aside plan, that the Richmond construction industry was characterized by racial discrimination and "exclusion on the basis of race" and that the need for remedial action was "not open to question." J.A. 41.[6] These views were echoed by the City Manager, Manuel Deese. J.A. 42. Statistics presented to the Coun-

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[4] Richmond was not alone in this approach. Since *Fullilove*, at least 32 states and 160 local governments have adopted minority set-aside requirements as part of their public contracting programs. See Motion for Leave To File Brief of the National League of Cities, *et al.*, in *Richmond* v. *Croson Co.*, No. 87-998, dated January 16, 1988, at p. 2.

[5] Quoting the text of the ordinance as reproduced in an appendix to the opinion of the District Court. J.S. Supp. App. 248.

[6] In formulating and supporting the plan, Mr. Marsh drew on 22 years of experience in Richmond as a practicing attorney, Mayor and member of the City Council. He had accumulated detailed knowledge of the extent and effects of racial discrimination by private and public entities in Richmond as lead counsel for plaintiffs in numerous lawsuits, including: *Patterson* v. *American Tobacco Co.*, 634 F.2d 744 (4th Cir. 1980), *vacated*, 456 U.S. 63 (1982) (employment); *Carson* v. *American Brands, Inc.*, 606 F.2d 420 (4th Cir. 1979), *rev'd*, 450 U.S. 79 (1981) (employment); *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968) (employment); *Evans* v. *Laurel Links, Inc.*, 261 F.Supp. 474 (E.D. Va. 1966) (public facilities); *Bradley* v. *School Board of Richmond, Virginia*, 345 F.2d 310 (4th Cir. 1965), *vacated on procedural grounds*, 382 U.S. 103 (1965) (education).

cil showed that, from 1978 to 1983, when Richmond had a minority population of 50%, two-thirds of 1% of the $124 million of public construction contracts let had been awarded to minorities. J.A. 12, 18, 41, 43.

Seven persons testified before the City Council on the set-aside plan, including representatives of various associations of contractors opposing the proposal. J.A. 17-40. None of those witnesses disputed either the fact of past racial discrimination in the Richmond construction industry or its continuing effects. Nor did any witnesses dispute the remedial purpose of the set-aside plan. Rather, these witnesses expressed concern over the lack of local minority subcontractors, the possibility that sham minority businesses would be awarded subcontracts, the potential that the plan would lead to increased construction costs, and the plan's possible anti-competitive effects. J.A. 20, 28, 31-36, 38-39.

Aware that this Court had approved a set-aside plan, the authors of the Richmond plan carefully modeled it after the federal one approved in *Fullilove*. J.A. 14-16, 24-27. The Council included a waiver and limited the plan's duration. J.A. 12, 14-15. The city attorney explained:

> "The reason for that and the suggestion that a date be put in, was that the federal cases that approved this sort of set-up have said that it's remedial legislation, and the purpose is to remedy past discrimination. And hopefully, in some period of time, this program will cause that to happen. Five years was deemed to be a period of time with which that would happen in all likelihood. It can be judged at that time and either continued—it may expire before that. It's an ordinance that can be amended by Council at any time. That was deemed to be a fair date to evaluate the effects of the program rather than leave it open-ended." J.A. 14-15.

The Council considered the efficacy of the set-aside as a remedy for the present effects of past discrimination. An ordinance prohibiting race discrimination in the

award of city contracts had been on the books since 1975,[7] yet the facts showed that minorities had nonetheless been essentially excluded from public contracts from 1978 through 1983. In contrast, Council was advised that the city's community development block grant program had utilized a set-aside requirement and achieved participation by minorities exceeding the goals of that plan. J.A. 41; *see also* J.A. 12-13, 16.

The Council was also aware that other cities, including Oakland, Cleveland, Toledo, and Boston, had adopted minority set-aside programs similar to the plan before it. J.A. 16, 18-19. In addition, the Legislature of the State of Virginia in 1982 had authorized public bodies to establish programs to facilitate minority participation.[8] The State also had established a Department of Minority Public Enterprise.[9]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case calls upon the Court to consider once again the vexing issue of race-conscious remedies for the present effects of discrimination.[10] These remedies have been considered necessary to avoid perpetuating the effects of past discrimination.[11] Yet, the Court has recognized that

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[7] Human Rights, Richmond, Va. Code § 17.2 (1975), attached hereto as Appendix No. 2.

[8] Virginia Public Procurement Act, § 11-48, Va. Code Ann. § 11.48 (1984).

[9] *Id.*

[10] *See, e.g., United States* v. *Paradise*, 107 S.Ct. 1053 (1987); *Johnson* v. *Transp. Agency, Santa Clara Cty., Cal.*, 107 S.Ct. 1442 (1987); *Local Number 93* v. *City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063 (1986); *Local 28 of Sheet Metal Workers* v. *E.E.O.C.*, 478 U.S. 421, 106 S.Ct. 3019 (1986); *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986); *Fullilove, supra*; *Steelworkers* v. *Weber*, 443 U.S. 193 (1979); *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978).

[11] *E.g., Wygant*, 476 U.S. at 280-82 (plurality).

such remedies, focusing as they do on race, are themselves problematic.[12]

Perhaps because of the clash of these competing values, the affirmative action cases that have come before the Court have generally been resolved by combinations of concurring opinions applying differing constitutional tests. Although the requirements of these tests differ, they reflect the common objective of achieving an appropriate balance between substantial but competing rights. Three types of such requirements are significant to the resolution of this case: (1) limitations on the kinds of discrimination a government may take affirmative action to remedy, (2) requirements for supporting evidence that the requisite discriminatory effects exist, and (3) requirements that the remedy be "narrowly tailored" to achieve its purpose.

The uncertainty created by the absence of a single approach in affirmative action cases was minimized in *Fullilove*, where six members of the Court approved the challenged minority set-aside. While the concurring Justices employed differing requirements, each opinion exhibited a sensitivity to the particular context and avoided categorical rules that would skew the balance of important interests involved.

The remedial program challenged here, like numerous similar state and local programs, was adopted, and approved by the District Court, in compliance with the most restrictive standard articulated by the Justices concurring in *Fullilove*, the strict scrutiny applied by Justice Powell.

We show below that the Fourth Circuit reversed the District Court on the basis of principles derived from the plurality opinion in *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986). *Wygant*, however, dealt with governmental action dissimilar in purpose, operation and

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[12] *E.g.*, *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 172-75 (1977) (Brennan, J., concurring in part).

impact on non-minorities. The Fourth Circuit opinion effectively abandons the balance struck in *Fullilove* and should be reversed.

1. The Court of Appeals held that the City could adopt a set-aside plan only to remedy its own past discrimination. This categorical limitation, not imposed in *Fullilove*, adds no significant protection against abuse yet would prohibit a uniquely effective remedy for identified discrimination in the City's construction industry. This Court should reject it. In any event, the City of Richmond should be permitted to adopt the plan to avoid perpetuating the effects of that discrimination in its public contracting.

2. The Court of Appeals' restrictive review of the evidence supporting Richmond's plan disregarded this Court's precedents and usurped the fact-finding function of the District Court. The District Court properly found that the evidence supported Richmond's action. If this Court should change the applicable law and then conclude that the District Court findings are inadequate, the case should be remanded for further fact-finding by the District Court.

3. The Court of Appeals employed an analysis inconsistent with this Court's precedents in holding that Richmond's plan was not "narrowly tailored." Richmond's plan meets the tailoring requirements identified in this Court's cases.

The limits imposed by the Fourth Circuit have no sound analytical foundation, contradict the persuasive and authoritative holding joined by six Justices in *Fullilove*, and would upset the structure of remedial action by state and local governments that has been erected on the foundation of *Fullilove* over almost a decade.

ARGUMENT

I. THE CONSTITUTION DOES NOT FORBID STATE AND LOCAL GOVERNMENTS FROM TAKING RACE-CONSCIOUS ACTION TO CURE DISCRIMINATION AND ITS EFFECTS IN INDUSTRIES WITH WHICH THEY DO BUSINESS.

The Court of Appeals held Richmond's set-aside plan unconstitutional because the Council lacked "a firm basis for believing that such action was required based on prior discrimination by the locality itself." 822 F.2d at 1360. That Court believed that the plurality in *Wygant* required "prior discrimination *by the government unit involved*" before an affirmative action plan could be upheld. *Id.* at 1358, quoting 476 U.S. at 274 (plurality) (emphasis added by Fourth Circuit). But *Wygant* imposed no such requirement. Furthermore, if such a requirement were appropriate, it is satisfied when state and local governments award contracts to a construction industry they know is characterized by discrimination.

A. State and Local Governments, Like Congress, May Constitutionally Undertake Affirmative Action to Cure the Effects of Past Discrimination Whether or Not They Have Participated in Such Discrimination.

This Court has recognized that both Congress and state governments have a substantial interest in remedying the continuing effects of discrimination.[13] The Court,

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[13] *E.g.*, *Bakke*, 438 U.S. at 307 (Powell, J.) ("The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination"); *id.* at 369 (Brennan, White, Marshall, Blackmun, JJ.) ("a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large"); *Fullilove*, 448 U.S. at 473 (plurality) (objective of ensuring that grantees electing to participate in Federal program "would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or fore-

however, has not reached agreement on the kinds of discrimination that justify use of race-conscious remedies. Among the Justices approving such remedies, Justice Powell has applied the most restrictive test. In his opinions in *Bakke* and *Fullilove*, Justice Powell wrote that race-conscious remedies that aid some persons "at the expense of other innocent individuals" can be justified only to cure the effects of "identified discrimination" as opposed to " 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past"; and that such remedies must be based on "judicial, legislative, or administrative findings of constitutional or statutory violations." *University of California Regents* v. *Bakke*, 438 U.S. 265, 307 (1978); *see Fullilove*, 448 U.S. at 497-98 (Powell, J., concurring).[14]

Notably absent from Justice Powell's formulation was any requirement that the "identified discrimination" found by the authoritative body be attributable to the governmental unit adopting the remedy. Indeed, in *Fullilove*, Justice Powell found his "strict scrutiny" requirements satisfied by congressional findings of actions by private parties and governmental units other than Congress—actions that would, "depending upon the identity of the discriminating party, violate Title VI of the Civil

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closed access by minority businesses to public contracting opportunities" is within congressional power); *id.* at 497 (Powell, J.) (citing *Bakke*, 438 U.S. at 307); *Paradise*, 107 S.Ct. at 1064 (plurality) ("It is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination. [citations omitted].").

[14] Justices Brennan, White, Marshall, and Blackmun and Chief Justice Burger all recognized that race-conscious remedies require some heightened scrutiny. *Bakke*, 438 U.S. at 358-62 (Brennan, White, Marshall, Blackmun, JJ.); *Fullilove*, 448 U.S. at 480 (Burger, C. J.); *id.* at 519 (Marshall, J.). These Justices took the position in those opinions, however, that the concerns requiring heightened scrutiny could be adequately taken into account without the special limitations imposed by Justice Powell.

Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, or 42 U.S.C. § 1981, or the Fourteenth Amendment." 448 U.S. at 506. Justice Stewart complained in dissent that "there is no evidence that Congress has in the past engaged in racial discrimination in its disbursement of federal contracting funds." *Id.* at 528.

In *Wygant*, Justice Powell applied his test to a collective bargaining agreement between a school board and a teachers' union that required, in the event of layoffs, that more senior non-minority employees be laid off before minority employees. The purpose of this provision was to preserve the attainments of an affirmative action hiring program. The lower courts, effectively by-passing the issue whether the school board had itself discriminated, upheld the lay-off provision on the basis of a need for minority "role-models" on the faculty to remedy the effects of "societal discrimination." 476 U.S. at 274. The number of desired role-models was keyed to the percentage of minority students. *Id.* In rejecting the "role-model" justification, Justice Powell stated:

> "This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." *Id.*

The Fourth Circuit interpreted this language to add to the standard announced by Justice Powell in *Bakke* and applied in *Fullilove* a requirement that the "identified discrimination" be discrimination by the governmental unit undertaking the affirmative action. 822 F.2d at 1358. But neither Justice Powell, nor Justice O'Connor, who stated the new requirement less ambiguously,[15]

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[15] *Wygant*, 476 U.S. at 288 (defining "societal discrimination" as discrimination not traceable to [the governmental unit's] own actions").

acknowledged any intention to change the standard or made any attempt to distinguish *Fullilove* or to articulate what useful purpose was served by the additional limitation.

We believe the most likely explanation for the language in *Wygant* relied on by the Court of Appeals lies in the particular facts of that case. Discrimination by the school board itself was the most obvious, if not the only, "identifiable" discrimination in the materials before the Court. The Court simply did not have before it the situation that was presented in *Fullilove* and is presented by this case—identifiable discrimination by a party other than the governmental unit adopting the remedy.[16] The requirement of findings of "identified discrimination," without the further limitation to discrimination by the governmental unit undertaking the plan, adequately satisfies Justice Powell's concern that the "role model theory" and comparison of the percentages of minority faculty and students were insufficient predicates for the race-conscious action.[17]

The language suggesting this new aspect of Justice Powell's test was neither adopted by a majority of the Court in *Wygant*, nor necessary to the result under any of the opinions in that case.[18] Nevertheless, as the opin-

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[16] Justice O'Connor's discussion of *Wygant* in *Johnson*, 107 S.Ct. at 1462, contrasts "societal discrimination" with "past and present discrimination *by the employer*" (emphasis added). Since prime contracting firms are employers, Justice O'Connor's test in *Johnson* could be satisfied under the facts here without discrimination by the City.

[17] According to Justice Powell, the "role model theory" has "no logical stopping point" and would allow the Board to discriminate "long past the point required by any legitimate remedial purposes." He also believed it could be used to "escape the obligation to remedy" relevant statistical imbalances indicative of discrimination. 476 U.S. at 275-76.

[18] Because of the status of the record and the proceedings below, all three opinions supporting the result rested not on the absence of a finding that the School Board had itself discriminated, but on the inappropriate nature of the remedy. 476 U.S. at 278

ion below illustrates, the *Wygant* dicta has had an impact on the courts of appeal.[19]

Neither the Fourth Circuit nor any other court overturning a set-aside plan on the basis of the *Wygant* dicta has explained how limiting States and localities to curing their own identified discrimination, as opposed to identified discrimination by others, would improve the balance between the competing interests involved. This Court should now reject that restriction.

The Fourth Circuit suggests that the limitation serves some purpose in preserving the "line between remedial measures and political transfers," 822 F.2d at 1360, but does not explain what, if any, additional protection the new limitation adds to the requirement that the discrimination to be cured be "identified." The Court's justification ignores identified discrimination by others and assumes that the only alternative to discrimination by the locality itself is unidentified "societal discrimination."

The Fourth Circuit's attempt to distinguish *Fullilove* on the basis of "the special competence of Congress," 822 F.2d at 1360, turns the structure of the Constitution on its head. While Congress must find an affirmative basis for its authority in the Constitution,[20] the Constitution leaves States free to exercise all powers subject to expressed limitations. Although Congress needed special authorization to pass legislation enforcing the equal protection guarantees of the Fourteenth Amendment, the

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(plurality); *id.* at 293-94 (O'Connor, J., concurring in part and in judgment); *id.* at 294-95 (White, J., concurring in judgment).

[19] *See, e.g., Michigan Road Builders Ass'n, Inc.* v. *Milliken*, 834 F.2d 583, 589-90 (6th Cir. 1987); *Assoc. Gen. Contr. of Cal.* v. *City & County of S.F.*, 813 F.2d 922, 929-30 (9th Cir. 1987).

[20] This special need to explain the basis of federal authority accounted for extended discussion in *Fullilove*. 448 U.S. 473-80 (plurality); *id.* at 499-502 (Powell, J.).

States needed no such special authority. *Bakke*, 438 U.S. at 368 & n.44 (Brennan, White, Marshall, Blackmun, JJ.).[21]

The District Court here held that Richmond's action was authorized under state law, J.S. Supp. App. 141-55, and the Fourth Circuit affirmed, 779 F.2d at 181, 184-186 (1985). Although the Fourth Circuit's opinion was vacated by this Court and remanded in light of *Wygant*, the fact that the Court of Appeals reached the federal constitutional issue in its remand opinion indicates that its position on the state law issues has not changed.[22]

In sum, the Constitution permits Richmond to exercise the power delegated to it by the State to enact a minority set-aside plan as a remedy for past discrimination by others without a threshold showing of its own participation in that discrimination.

B. State and Local Governments Participate in Discrimination When They Award Contracts to a Construction Industry Characterized by Discrimination.

Assuming *arguendo* that the Fourteenth Amendment limits a city's authority to remedying discrimination in which the city itself has participated, the Richmond plan should nevertheless be approved. A local government becomes a participant in discrimination when it awards contracts to companies in an industry characterized by discrimination.

Richmond has a special interest in curing, at least in the context of public contracting, the effects of past dis-

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[21] *See* Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753 (1985).

[22] *See Schmidt* v. *Oakland Unified School Dist.*, 457 U.S. 594 (1982), *vacating and reversing* 662 F.2d 550 (9th Cir. 1981) (lower court improperly failed to consider authority of locality under state law prior to reaching federal constitutional question).

crimination by those in the construction industry. In the absence of such curative action, Richmond's "facially neutral" awards of public contracts inevitably perpetuate the effects of past discrimination. This Court in *Fullilove* recognized the importance of eliminating such state involvement. Chief Justice Burger stated: "[C]ongressional authority extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination. *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *cf. City of Rome* [v. *United States*, 446 U.S. 156, 176-77 (1980)]." 448 U.S. at 477 (plurality). He emphasized that "traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination," and approved a minority set-aside program "to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws." *Id.* at 478.

Subsequent cases have recognized the States' interest in ensuring public access to commercial opportunities—including those in the private sector—free from the taint of discrimination. *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary International* v. *Rotary Club of Duarte*, 107 S.Ct. 1940 (1987). States have an even greater interest in assuring nondiscriminatory access to commercial opportunities they themselves provide.

A governmental entity that participates in "business as usual" by awarding public contracts with knowledge of discrimination in the industry performing them violates the Fourteenth Amendment. The entity under such circumstances is a "joint participant in a pattern of racially discriminatory conduct. . . ." *Ethridge* v. *Rhodes*, 268 F. Supp. 83, 87 (S.D. Ohio 1967). There the court granted an injunction against a state construction project because minorities "will not be able to get jobs." *Id.*

Although it was the union that refused to refer blacks, the court rejected the state's defense that there was no state action:

> "[W]hen a state has become a joint participant in a pattern of racially discriminatory conduct by placing itself in a position of interdependence with private individuals acting in such a manner—that is, the proposed contractors acting under contract with unions that bar Negroes—this constitutes a type of 'state action' proscribed by the Fourteenth Amendment. *Burton* v. *Wilmington Parking Authority*, [365 U.S. 715 (1961)]. Thus, . . . where a state through its elected and appointed officials, undertakes to perform essential governmental functions—herein, the construction of facilities for public education—with the aid of private persons, it cannot avoid the responsibilities imposed on it by the Fourteenth Amendment by merely ignoring or failing to perform them." *Id.*

Other courts have accepted the "state action" theory articulated in *Ethridge. Nat. Black Police Ass'n, Inc.* v. *Velde*, 712 F.2d 569, 580-83 (D.C. Cir. 1983) (federal agency had constitutional duty to terminate funds to local agencies known to be engaging in discrimination); *Percy* v. *Brennan*, 384 F. Supp. 800, 811-12, (S.D.N.Y. 1977) (government acquiescence in racially discriminatory practices by construction industry is a statutory and constitutional violation).

Limiting the power of States and localities to remedy the effects of past discrimination to those situations where the entity has itself discriminated does not measurably advance the goals of equal protection. This Court should recognize that, at the very least, governments are not barred from attempting to free their own public contract awards from the taint of discrimination, whether their own or that of the industry that bids on the contracts.

II. THE FOURTH CIRCUIT IMPROPERLY HELD THAT RICHMOND HAD NO FIRM BASIS FOR BELIEVING REMEDIAL ACTION WAS REQUIRED.

We have considered the kinds of discrimination that can justify a set-aside plan. We now examine the support for a conclusion that discrimination of the requisite nature existed here.

The District Judge determined after review of the applicable law and the evidence before him that

> "the evidence before the City Council when it enacted the ordinance supports the conclusion that participation of minority businesses in the Richmond area construction industry in general, and the City's construction contracting in particular continues to be adversely affected by past discrimination." J.S. Supp. App. 163-64.

Although the District Court unambiguously found discrimination in the construction industry, *id.* at 163, its findings are less explicit with respect to intentional discrimination by the City itself (aside from the City's perpetuation of discrimination by others through its public contracting). At the time of its decision, *Wygant* had not been decided and more precision on this issue was unnecessary.

The Fourth Circuit on remand held the plan unconstitutional because the record failed to satisfy the requirement, derived from the *Wygant* dicta, for evidence that the plan was adopted to cure the City's own discrimination. Rather than remanding to allow the District Court to consider the case under this new standard, the majority resolved the factual issues under that standard itself, without briefing by the parties. 822 F.2d at 1358-60. In contrast, the dissent concluded that "the Richmond Council had a firm basis for believing it had engaged in past discrimination in awarding public contracts." *Id.* at 1364.

This Court's determination of the kinds of discrimination that can justify a set-aside plan will frame the

relevant evidentiary issues. If this Court holds that Richmond was permitted to adopt a set-aside remedy to avoid perpetuating through award of public contracts the effects of past discrimination in the construction industry, then the District Court's finding quoted above should be adequate to support that purpose. That finding should be affirmed unless clearly erroneous. Alternatively, if this Court should require that the City itself discriminated, the Court would have to determine whether the District Court made an adequate finding on that issue. If so, that finding should be upheld unless clearly erroneous. If not, the case should be remanded to the District Court for reconsideration in light of the standard announced by the Court.

Regardless of how this Court resolves the issues in Part I, the Fourth Circuit's treatment of the evidentiary issues was erroneous. The Court of Appeals violated three principles derived from this Court's prior cases that should govern consideration of the evidentiary issues in this case: (1) to preserve the incentive for voluntary remedial action by a party in jeopardy of suits from opposing sides, contemporaneous self-incriminatory findings will not be required;[23] (2) legislative action does not require record support of the formality necessary to sustain judicial or administrative action;[24] and (3) the district

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[23] The adverse impact on incentives for voluntary action "cannot . . . be justified by reference to the incremental value a contemporaneous findings requirement would have as an evidentiary safeguard". *Wygant*, 476 U.S. at 289-91 (O'Connor, J., concurring). *See Bakke*, 438 U.S. at 364 (Brennan, White, Marshall, Blackmun, JJ.); *Johnson*, 107 S.Ct. at 1450-51. Accordingly, the Court has required at most a "firm basis for concluding that remedial action was appropriate." *Wygant*, 476 U.S. at 292-93 (O'Connor, J.); *id.* at 277 (plurality).

[24] *Fullilove*, 448 U.S. at 478 (plurality); *id.* at 502 (Powell, J.). Rather than "confin[ing] its vision to the facts and evidence adduced by particular parties," a legislative body has the "broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue." *Id.* at 502-03. The "information . . . expertise [and] experience" of legislators are an

court plays the dominant role in finding facts.[25]

A. The District Court's Finding that the City Had Adequate Support for Believing that Its Public Contracting Awards Were Perpetuating Effects of Discrimination Should Be Sustained.

If this Court holds that the Constitution permits Richmond to take affirmative action either to cure the effects of discrimination in the construction industry or to prevent the perpetuation of those effects through award by the City of public contracts, it will then have before it a clear finding by the District Court, *supra*, p. 16, that the City Council had sufficient support for either purpose. That finding is not "clearly erroneous"; indeed, it is clearly correct.

1. The Council had before it a striking statistical disparity: from 1978 to 1983, less than 1% of city construction contracts, a figure approaching "the inexorable

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"appropriate source." *Id.* at 503. *See Ohio Contractors Ass'n* v. *Keip*, 713 F.2d 167, 171 (6th Cir. 1983) (legislators deemed to be aware of prior judicial findings, executive investigations and prior legislative work regarding discrimination); *Southwest Washington Chap., Nat'l Elec. Contr. Assn.* v. *Pierce Cnty.*, 667 P.2d 1092, 1100 and n.2 (Wash. 1983) (recognizing that the work of local legislative bodies occurs at meetings and conferences but that local bodies "cannot be expected to undertake the expense of detailed recordkeeping comparable to Congress").

[25] A district court's determination whether or not discrimination occurred is a finding of fact subject to F. R. Civ. P. 52(a), and must be affirmed unless "clearly erroneous" or based on an incorrect legal standard. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 (1982). When the district court either fails to make necessary findings or makes findings that are infirm because of an error of law, a remand is "proper unless the record permits only one resolution of the factual issue." *Id.* at 291-92. A determination whether a legislative body had a sufficient basis for believing discrimination justifying affirmative action had occurred differs from a court's determination that discrimination occurred. But the district court's role is essentially the same—weighing the evidence according to appropriate legal standards—and the same institutional considerations apply. *See Anderson* v. *Bessemer City*, 470 U.S. 564, 574-75 (1985).

zero," [26] were awarded to minority contractors in a city with a 50% minority population. The Fourth Circuit rejected this statistical evidence, characterizing the disparity as "spurious": "[t]he appropriate comparison is between the number of minority contracts and the number of minority *contractors* . . . ." 822 F.2d at 1359 (emphasis in original).

Wygant, upon which the Fourth Circuit relied heavily, is readily distinguishable. There, this Court rejected the statistical relationship between minority teachers and minority students as a basis for a plan protecting minorities from lay-offs. As this Court recognized, that statistical relationship was not relevant to whether there had been discrimination against minority teachers. 476 U.S. at 274-76.[27]

By contrast, a comparison of the percentage of public contracts awarded to minorities with the percentage of minorities in the general population is relevant to a determination whether discrimination has occurred. Comparisons to groups narrower than the general population may as a general rule be preferable as evidence of discrimination. Nevertheless, where racial discrimination at the "entry level" has thwarted the development of minority businesses or prevented minorities from acquiring skills, this Court has approved the use of general population statistics as a proxy for the number of minorities that would be present in the more narrowly defined population but for the effects of present and past discrimination. *See Teamsters* v. *United States*, 431 U.S. 324,

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[26] *Johnson*, 107 S.Ct. at 1465 (O'Connor, J.), citing *Teamsters* v. *United States*, 431 U.S. 324, 342, n.23 (1977).

[27] Papers before this Court in *Wygant* indicated that in 1972, the percentage of minority students, 16%, was dramatically higher than the percentage of minorities in the general community population, about 4%. Minority teachers in 1972 represented 8% of the faculty and thus exceeded the minority representation in the community. Brief of *amicus* Anti-Defamation League in *Wygant*, pp. i, 12-13.

339-40 & n. 20 (1977); *Steelworkers* v. *Weber*, 443 U.S. 193, 198-99 (1979); *id.* at 215 (Blackmun, J., concurring); *Johnson* v. *Transp. Agency, Santa Clara Cty., Cal.*, 107 S. Ct. 1442, 1450 (1987), *id.* at 1462-1463 (O'Connor, J., concurring); *United States* v. *Paradise*, 107 S. Ct. 1053, 1065 & n. 19 (plurality). Thus, in *Fullilove* itself, this Court accepted Congress' comparison of the percentage of contracts awarded minority contractors, 1%, with the percentage of minorities in the general population, 15-18%, as "evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises." 448 U.S. at 478 (plurality).

This Court has accordingly avoided the "gross anomaly" pointed out by the dissent below—"a proof scheme requiring a comparison of the percentage of contracts awarded with this small qualified pool of minority contractors would ensure the continuation of a systematic *fait accompli*, perpetuating a qualified minority contractor pool [that reflects discriminatory barriers to entry]." 822 F.2d at 1365 & n.11. *See Johnson*, 107 S.Ct. at 1462 (O'Connor, J.).[28]

Similar concerns have led the Office of Federal Contracts Compliance Programs ("OFCCP") of the U.S. Department of Labor, the agency charged with assuring non-discrimination by federal contractors, to use the percentage of minorities in the general population as the basis for setting affirmative action employment goals to be met by federal construction contractors. 45 Fed. Reg. 65976 *et seq.* (Oct. 3, 1980). Various contractors ob-

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[28] Other communities have used comparisons with the minority population in assessing the need for remedial set-asides. *See, e.g., South Fla. Chap.* v. *Metropolitan Dade County, Fla.*, 723 F.2d 846, 855 (11th Cir. 1984) (citing disparity between percentage of black county contractors (1%) and the county's general black population (17%)); *Schmidt* v. *Oakland Unified School Dist.*, 662 F.2d at 559 ("statistical disparity between the sizeable minority population of the community and the meager extent" of minority participation in public contracts).

jected to establishment of goals on an industry-wide basis reflecting general population statistics, and made arguments similar to those accepted by the Fourth Circuit:

> "Contractors contended that the minority goals should be by individual trade/craft rather than a single goal for all crafts because to do otherwise ignores the unavailability of minority construction workers, both skilled and unskilled, and makes it virtually impossible for contractors to meet the goal." *Id.* at 65983.

The OFCCP rejected this argument, relying on *Weber*:

> "the single goal concept is predicated upon the proposition that had it not been for the long-standing exclusion of minorities from the skilled construction crafts, minorities would be represented in those crafts at least to the extent of their representation in the total labor force in a given geographical area. (See *United States Workers of America* v. *Weber*, 443 U.S. 193)." *Id.*

2. The District Court, as did the Council, weighed as well other evidence indicating discrimination in the construction industry. The Court of Appeals characterized that other evidence as "meager," consisting of "some conclusory and highly general statements." 822 F.2d at 1358. This characterization exemplifies the kind of overly-technical factfinding requirements condemned by this Court in *Fullilove*. 448 U.S. at 478-80 (plurality); *id.* at 502-03 (Powell, J.).[29]

As described in detail in the Statement, *supra*, pp. 2-5, the Council's framing and adopted of the set-aside plan

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[29] *See also Wygant*, 476 U.S. at 289-91 (O'Connor, J). It is revealing to compare Judge Wilkinson's majority opinion on remand with his dissent, which is more explicit about requiring "detailed factual findings." *E.g.*, 779 F.2d at 204. While the later opinion acknowledges the principles noted at pp. 17-18, *supra*, 822 F.2d at 1359, its approach to the record belies its words.

were informed by the hearing proceedings[30] and by the studies of Council members and city administrators and their wealth of experience with the extent and effects of prior segregation and discrimination in Richmond. This experience and evidence either were not considered or were rejected by the Fourth Circuit as "nearly weightless." 822 F.2d at 1359.

In evaluating the Council's action, the District Court took judicial notice of the congressional findings of discrimination in the construction industry detailed by this court in *Fullilove*. J.S. Supp. App. 165-166.[31]

3. In sum, there is more than adequate support for the District Court's finding that Richmond had sufficient evidence to believe its action was necessary to cure the effects of discrimination in the construction industry, and, in particular, the perpetuation of those effects in the awarding of public contracts.

B. The Council Had a Reasonable Basis To Believe that the City Itself Had Discriminated.

If this Court should hold that in order to justify the set-aside plan, Richmond must demonstrate that there was a reasonable basis for believing that the City itself had discriminated, the existence of the requisite evidence and finding is not so clear. Two factors explain the am-

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[30] Opponents of the ordinance had reviewed the proposed setaside and prepared for the Council debate in advance. Two construction industry organizations had retained counsel from a prominent Richmond law firm to present their case to the Council. J.A. 19.

[31] Pervasive discrimination and racial exclusion in the construction industry have been so well documented by courts that this Court has found them to be a proper subject for judicial notice. *Weber*, 443 U.S. at 198 & n.1 ("Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice."). *See also Grant* v. *Bethlehem Steel Corp.*, 635 F.2d 1007 (2d Cir. 1980); *Local Union No. 35 of IBEW* v. *Hartford*, 625 F.2d 416 (2d Cir. 1980); *Denton* v. *Boilermakers*, 650 F.Supp. 1151 (D. Mass. 1986).

biguity of the existing record and the District Court's findings on the issue of the City's own discrimination: members of the Council were reluctant to incriminate themselves or the City.[32] and the precedents available to the Council and the District Court did not require any finding that the City itself had discriminated in order to justify such a program. See, *supra*, pp. 8-15.

Nevertheless, the District Court's finding that "the City's construction contracting in particular continues to be adversely affected by past discrimination," J.S. Supp. App. 164, could be read to mean that the City itself had discriminated. The dissent below so concluded.[33] To find that discrimination by the City itself played no role in the past exclusion of minority contractors from public

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[32] One Council member expressed fear that adoption of a remedial program would expose the City to liability for past discrimination (J.A. 15):

> "CITY ATTORNEY: No, I don't feel that we're exposing ourselves to liability, but the Supreme Court, when it approved the ten percent minority set-aside, specifically said that the justification was that it was remedial. We've reviewed the statistics of the construction contracts, and it certainly justifies that. We have tried to tailor this ordinance as closely to the federal ordinance, which was—or federal statute, which was upheld by the Supreme Court, as possible. And, yes, it is remedial. I don't think that's exposing us to any liability for prior acts.
>
> "COUNCIL MEMBER: . . . Doesn't the word remedial mean to make special efforts at the moment and in the near future to make up for prior deficiencies?
>
> "CITY ATTORNEY: Yes. In the term remedial, we're not just implying that the City was intentionally discriminatory in the past. What we're saying is there are statistics about the number of minorities that were awarded contracts in the past which would justify the remedial aspects of the legislation. We're not saying there was intentional discrimination in any particular case. . . . And they allowed more use of broader statistics than they do in a lot of cases. I'm not saying that we have discriminated in any individual case in the past."

[33] "The conclusions that emerged from the Council's debate concerned the City's previous discrete discrimination in awarding contracts for public construction projects." 822 F.2d at 1366.

contracts would require closing one's eyes to the history of Richmond's pervasive purposeful discrimination that was all too familiar to the Council members.[34]

Should the Court conclude that the District Court's findings cannot be read to support the City's belief in its own discrimination, the proper course would be to remand to the District Court for appropriate findings under the new standard imposed by the Court. *See Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-92 (1982).

III. THE RICHMOND PLAN IS NARROWLY TAILORED TO ACHIEVE ITS REMEDIAL GOAL OF ENDING RACIAL EXCLUSION IN PUBLIC CONTRACTING.

We now consider the third criterion for evaluating the constitutionality of Richmond's set-aside ordinance: the requirement that the plan be "narrowly tailored to the achievement of [its] goal." *Fullilove*, 448 U.S. at 480 (plurality). In his concurrence in *Fullilove*, Justice Powell cautioned that this requirement does not restrict a legislature to the "least restrictive" alternative. *Id.* at 508. Rather, the legislature's "choice of a remedy should be upheld . . . if the means selected are equitable and reasonably necessary to the redress of identified discrimination." *Id.* at 510. Justice Powell described the measure of discretion accorded Congress "to choose a suitable remedy for the redress of racial discrimination" as similar to judicial discretion in choice of remedies—a balancing process left to the sound discretion of the trial court. *Id.* at 508, citing *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 794 (1976) (Powell, J. concurring in part and dissenting in part). *See also Paradise*, 107 S.Ct. at 1073-74 (plurality).

This Court has generally considered the five factors, originally identified by Justice Powell, in deciding whether a remedy is properly tailored: "(i) the efficacy

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[34] *See City of Richmond* v. *United States*, 422 U.S. 358 (1975); *Bradley* v. *School Board*, 462 F.2d 1058 (4th Cir. 1972); *aff'd by an equally divided Court*, 412 U.S. 92 (1973) (per curiam).

of alternative remedies . . ., (ii) the planned duration of the remedy . . .," (iii) "the percentage chosen for the set-aside . . .," (iv) "the availability of waiver . . .," and (v) "the effect of the set aside upon innocent third parties." *Fullilove*, 448 U.S. at 510-14. *See Paradise*, 107 S.Ct. at 1067; *Johnson*, *supra*. The Fourth Circuit misapplied these factors in reaching its alternative holding that Richmond's program was not adequately tailored.

A. The City Council Considered Alternatives.

This Court in *Fullilove* indicated that Congress' experience with other unsuccessful remedies demonstrated that it had adequately considered alternatives.

> "By the time Congress enacted [the set-aside] in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry. Although the problem had been addressed by antidiscrimination legislation, executive action to remedy employment discrimination in the construction industry, and federal aid to minority businesses, the fact remained that minority contractors were receiving less than 1% of federal contracts." 448 U.S. at 511 (Powell, J.).

Similarly, the Richmond Council had tried an antidiscrimination provision. In place since 1975, this prohibition on discrimination in award of public contracts had not affected the barriers to entry preventing minority participation in public contracting. On the other hand, the Council was advised that a set-aside used in the community development block grant program had had more favorable results. See pp. 4-5, *supra*. The record shows that, based on their past experience, the council members selected a remedy they believed held more promise of success than other alternatives.[35]

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[35] Because the set-aside effectively requires non-minority contractors to work with MBEs, it is the only alternative which may overcome "lack of confidence in minority business ability or racial

B. The Set-Aside Program Is Limited in Duration.

The set-aside adopted by Richmond is a temporary measure, expiring on June 30, 1988, five years after it became effective. J.S. Supp. App. 247-48. The Fourth Circuit treated the automatic expiration as something less than automatic—"[w]hether the Richmond plan will be retired or renewed in 1988 is . . . nothing more than speculation." 822 F.2d at 1361.

The duration factor is used to guarantee that the program in question is a temporary remedy to cure the effects of past discrimination rather than a permanent mechanism to maintain racial balance. In *Johnson* and *Weber*, this Court approved affirmative action plans as remedial and temporary in operation even though the plans contained no specific termination dates. *Johnson*, 107 S.Ct. at 1456; *Weber*, 433 U.S. at 208-09. By contrast, the Richmond plan is explicitly temporary. See p. 4, *supra*.

C. The Council Selected a Reasonable Figure for the Set-Aside Percentage.

Richmond established a 30% set-aside goal based on a 50% general minority population. The Fourth Circuit criticized the 30% goal as arbitrary. 822 F.2d at 1360. This criticism is unfounded.[36]

In establishing the 30% goal, Richmond applied Justice Powell's approach in *Fullilove* to the local circumstances. Justice Powell approved "[t]he choice of a 10% set-aside [falling] roughly halfway between the present percentage of minority contractors and the percentage of

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prejudice and misconceptions." *Constructors Assoc. of Western Pa.* v. *Kreps*, 441 F. Supp. 936, 953 (W.D. Pa. 1977).

[36] Judge Sprouse, dissenting, said that "judging the set-aside percentage by referring to the small proportion of existing MBEs in the economy would perpetuate rather than alleviate past discrimination." 822 F.2d at 1367.

minority group members in the Nation." 448 U.S. at 513-14. Although the specific number of minority contractors in Richmond is not contained in the record, the City Council was informed by the representatives of the construction industry who testified on the plan that there were few. J.A. 27, 33-36, 40, 44. The 30% figure falls roughly halfway between the minority participation rate, below 1%, and the minority population of 50%.[37]

Buttressing the reasonableness of the percentage chosen by the Council is the related action of the OFCCP which set employment goals for the construction industry substantially equal to the minority population percentage. See p. 21, *supra*.

D. The Richmond Plan Provides for an Adequate Waiver.

In order to assure that its plan was flexible, Richmond incorporated a waiver provision.[38] A non-minority contractor may obtain a waiver of the 30% subcontracting requirement on a showing that despite best efforts there are no minority subcontractors available or willing to participate. The District Court, applying *Fullilove* found the waiver sufficient to protect against rigid application. J.S. Supp. App. 175-93.

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[37] *See Southwest Washington Chap.* v. *Pierce Cnty., supra*, 667 P.2d at 1101 (approved MBE goal "slightly less than the minority population in Pierce County"); *Schmidt* v. *Oakland Unified School Dist., supra*, 662 F.2d at 559 (approving 25% MBE goal where city population was 34.5% minority).

[38] The standard for waiver is as follows:

> ". . . it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises (which can perform subcontracts or furnish supplies specified in the contract bid) are unavailable or unwilling to participate in the contract to enable meeting the 30% MBE goal." J.S. Supp. App. at 68.

The Fourth Circuit rejected the waiver because it is limited to " 'exceptional circumstances,' " and is a matter of "administrative discretion" and because the prime contractor bears the "burden of obtaining the waiver." 822 F.2d at 1361. The Richmond "waiver provisions were purposely drawn to parallel those approved in *Fullilove*," 822 F.2d at 1367 (Sprouse, J., dissenting), and the waiver approved in *Fullilove* was also available only "under exceptional circumstances." *Compare* J.S. Supp. App. 67 *with* 448 U.S. at 494. In *Fullilove*, as here, the waiver decision was an exercise of administrative discretion. *Id.* at 468-72. Finally, in each case the entity responsible for complying with the percentage set-aside (*i.e.*, the State or locality in *Fullilove* and the contractor here) is the entity that may seek the waiver. J.S. Supp. App. at 189. In sum, the *Fullilove* standard was followed and the contractors are given "the opportunity to demonstrate that their best efforts" will not achieve the "target for minority firm participation." 448 U.S. at 488 (plurality).

E. The Burden on Non-Minorities Is Consistent with Fundamental Fairness.

Inherent in the set-aside concept is the "[f]ailure of non-minority firms to receive certain contracts . . ., an incidental consequence of the program." *Id.* at 484 (plurality). This burden is to be assessed to determine whether "the effect of the set-aside is limited and so widely dispersed that its use is consistent with fundamental fairness." *Fullilove*, *Id.* at 515; *Wygant*, 476 U.S. at 282-83. The Fourth Circuit erroneously concluded that the Richmond set-aside "imposes an overbroad competitive burden on non-minority businesses." 822 F.2d at 1361.

The burden imposed by the Richmond set-aside is limited in scope and duration. The set-aside applies only to subcontracts and not to prime contracts. Since it applies to all non-minority contractors, the burden is shared by

many. Those who share this limited burden inevitably include many who benefitted from prior discrimination. Because these contracts represent only a fraction of construction projects, the set-aside affects "only one of several opportunities." [39] *Wygant*, 476 U.S. at 283.

Finally, this set-aside, unlike the lay-offs disapproved in *Wygant*, does not disturb any "firmly rooted expectation." *Johnson*, 107 S. Ct. at 1455.

In sum, review of the Richmond set-aside plan in light of the five factors articulated by this Court compels the conclusion that the ordinance was narrowly tailored to achieve its remedial purpose.

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[39] Using census data, the City in its brief to this Court has calculated that city projects accounted for only 10% of all construction contracts during 1978 to 1983. The set-aside thus affects only three percent of local contracting opportunities. Because nonminorities can participate as a 49% owner in an MBE or can form a 51%-49% joint venture with an MBE and still receive a set-aside, the opportunities affected are reduced even further.

CONCLUSION

For the reasons stated above, we urge the Court to reverse the decision below of the Court of Appeals for the Fourth Circuit and uphold the Richmond Minority Business Utilization Plan as constitutional.

Respectfully submitted,

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April 21, 1988

APPENDIX NO. 1

Description of Amici Organizations

The Lawyers' Committee for Civil Rights Under Law is a nonprofit organization established in 1963 at the request of the President of the United States to involve leading members of the bar throughout the country in a national effort to insure civil rights to all Americans. Through its national office in Washington, D.C., and its local Lawyers' Committees such as the Washington, D.C. Lawyers' Committee for Civil Rights Under Law, the organization has over the past 25 years enlisted the services of thousands of members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

The Mexican-American Legal Defense and Educational Fund is a national civil rights organization founded in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics in the United States.

The NOW Legal Defense and Education Fund ("NOW LDEF") is a nonprofit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization for Women. In seeking to eliminate barriers that deny women economic opportunities, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting employment discrimination, including cases before this Court involving challenges to the use of affirmative action remedies to achieve equal employment opportunity.

The National Association for the Advancement of Colored People is a New York nonprofit membership cor-

poration founded in 1909. The principal objective of the NAACP is to ensure the political, educational, social and economic equality of minority group citizens and to achieve equality of rights and eliminate race prejudice among the citizens of the United States. The General Counsel's office represents the 1800 branches in litigation involving voting, housing, school desegregation and employment discrimination.

The Women's Legal Defense Fund ("WLDF") is a nonprofit, tax-exempt membership organization founded in 1971 to provide legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, public education, and advocacy before the EEOC and other federal agencies charged with enforcement of equal opportunity laws. In its pursuit of equality for both women and minorities, WLDF is committed to the use of affirmative action to achieve equal employment opportunities.

APPENDIX NO. 2

Human Rights Code of the City of Richmond

Sec. 17-1. Short title.

The chapter shall be known and may be cited as the "Human Rights Code of the City of Richmond, Virginia." (Code 1975, § 17.1-1)

Sec. 17-2. Policy.

The city council declares that each citizen deserves to be accepted on the basis of his ability, qualifications and responsibility. In pursuing that goal that council declares:

(1) That, except as hereinafter provided, it is and shall be the policy of the city, in the exercise of its police power and all other powers it may possess, to protect the safety, health, peace, good order, comfort, convenience, morals and welfare of its inhabitants, to assure all qualified persons the opportunity to obtain housing, credit, city contracts, and city employment, without regard to race, color, sex, religion, national origin, marital status, age, or handicap due to physical, mental, or developmental causes hereafter referred to as protected classes;

(2) That to carry out these goals and policies it is and shall be the policy of the city generally, except as hereinafter provided, to prohibit discrimination against the protected classes in housing, credit, city contracts and city employment.

(Code 1975, § 17.1-2)

Sec. 17-3. Definitions.

The following words and phrases, when used in this chapter, shall have the meanings respectively ascribed to them:

Affirmative action employment program means a positive program for city employees and city contracts designed to insure that a good faith effort will be made to employ qualified applicants without regard to race, sex, color, religion, and national origin. Such program, to be developed by the city manager and approved by city council, and monitored by the human relations commission, shall include, where applicable but shall not be limited to, the following: recruitment and recruitment advertising, selection and selection criteria, upgrading, promotion, demotion or transfer, lay-off or termination, rates of pay or other forms of compensation, other terms or conditions of employment and selection for training, including apprenticeship; and shall include realistic and attainable goals, methodology and timetable for implementation of the program.

* * * *

Sec. 17-5. City employment practices.

(a) Except as provided in subsection (b) of this section, it shall be unlawful:

(1) For the city to fail or refuse to hire or to discharge any qualified person or otherwise to discriminate against any qualified person with respect to hiring, training, tenure, compensation, promotion, discharge or any other terms, conditions or privileges directly or indirectly related to employment for the sole reason that he or she is a member of a protected class;

(2) For the city to publish or circulate, or to cause to be published or circulated with intent to circumvent the spirit and purpose of this section,

any notice or advertisement relating to employment or membership which indicates any preference, limitation, or discrimination based on being a member of a protected class or an intention to make any such preference, limitation, or discrimination;

(3) For the city to fail or refuse to accept, register, classify properly or refer for employment or otherwise to discriminate against any qualified person because of being a member of a protected class;

For the city to discriminate against any qualified person because he has opposed any practices forbidden by this section or because he has made a complaint or testified ~~or~~ assisted in any manner in any investigation or proceeding under this chapter relating to the provisions of this section.

(b) Nothing in subsection (a) of this section shall apply to:

(1) Any type of employment, occupation or position where the job involves a bone fide occupational qualification requiring the employment of a person or persons of a particular sex, age, or physical and mental qualification where such qualifications is reasonably necessary to the normal operation of that department, agency or program.

(2) Any employment practice based upon applicable laws or regulations established by the United States or any agency hereof, the state, or any political subdivision of the state having jurisdiction in the city;

(3) The city terminating employment or otherwise taking action concerning a person under the

terms of the city's personnel manual concerning retirement, pension, or disability plan for group or employee insurance plan;

(4) Agreements or contracts concerning contribution rates for the city or its employees for group insurance, when such contribution rate can be affected by marital status or number of dependents;

(5) Any city employment program providing services only to elderly persons or to minors; provided, however, that no discrimination be made based on race, color, sex, religion, ancestry, national origin, marital status, or handicap due to physical, mental or developmental causes.

(c) The city manager shall establish an affirmative action employment program as defined in section 17-3 for city employees. The human relations commission shall review this program and shall report to city council regarding the status of same, at least twice a year.
(Code 1975, § 17.1-5)

Sec. 17-6. City contracts.

(a) Any contract entered into by the city under which the city expends ten thousand dollars ($10,000.00) or more of its funds shall include the following provisions for equal employment opportunity:

(1) The contractor agrees not to discriminate against any qualified employee or applicant for employment for the sole reason that he is a member of a protected class, except as is otherwise provided by law. In addition, once protected class members are employed, they will be treated during employment, without regard to their membership in such protected class. As used herein, the word "treated" shall include,

without limitation, the following: recruited, whether by advertising or other means; compensated, whether in the form of rates of pay or other forms of compensation; selected for training, including apprenticeship; promoted; upgraded; demoted; downgraded; transferred; laid off; and terminated.

(2) The contractor agrees to implement an affirmative action employment program as defined in section 17-3.

(3) The contractor agrees during the life of any contract to include in all solicitations or advertisements for employees placed by or in behalf of the contractor the words "Equal Opportunity Employer" or a symbol, approved by the commission meaning same.

(4) The contractor agrees during the life of a contract to notify each labor organization or representative of employees with which the contractor is bound by a collective bargaining agreement or other contract of the contractor's obligations pursuant to this section.

(5) The contractor agrees during the life of any contract to submit to the city's human relation commission upon request, but at least annually, a copy of the regular equal employment opportunity reports (EEO-1) which the contractor is required to submit to the equal employment opportunity commission; provided, however, that the executive director may request more frequent special reports of particular contractors provided the commission has found such contractors to have previously violated any provision of this chapter. If the contractor is not required to file EEO-1 forms with the equal opportunity commission, he shall file this

information on a form to be provided by the human relations commission.

(6) The contractor agrees during the life of any contract to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this section and/or notices required to be posted by Title VII of the Civil Rights Act of 1964, as amended.

(7) The contractor agrees to include the provisions of subsections (1) through (6) above in every subcontract with persons meeting the definition of subcontractor contained in section 17-3 so that such provisions will be binding upon each subcontractor.

(8) The contractor agrees that if the contractor's noncompliance with any provision of this equal employment opportunity clause, upon a finding of such noncompliance by the city's human relations commission and certification of such finding to the city manager, the city manager may terminate or suspend or not renew, in whole or in part, this contract.

(b) Contract compliance requirements:

(1) All notices to prospective bidders published on behalf of the city shall include as part of the contract specifications the condition that all bidders will be required to comply with the "Richmond Human Rights Ordinance" regarding equal employment opportunity.

(2) All reports required herein shall be submitted in duplicate to the department of general services, unless otherwise directed herein.

(3) Each bidder shall file with the department of general services as part of bid documents cop-

ies for the preceding two (2) years of the regular equal employment opportunity reports (EEO-1) which the contractor has been required to submit to the equal employment opportunity commission. If the contractor is not required to file EEO-1 forms with the equal employment opportunity commission, he or she shall file this information on a form to be provided by the human relations commission.

(4) Following receipt from the department of general services of the employment information submitted by bidder, the commission on human relations shall review and determine whether or not the successful bidder has complied with this ordinance and shall submit the commission's determination and recommendation thereon to the city manager, director of the department involved, and the department of general services. At the request of any bidder, contractor or subcontractor, the human relations commission shall provide advice and assistance regarding methods for adopting and implementing an affirmative action employment program or regarding any other aspect of compliance with this section.

(c) The executive director of the commission on human relations is hereby authorized to:

(1) Review the performance of any contractor who has a contract with the city with respect to the provisions of subsection (a);

(2) Request equal employment opportunity reports from any contractor pursuant to subsection (a)(5);

(3) Upon a finding of probable cause to believe a violation of any provision of subsection (a)

has occurred, file a complaint with the commission pursuant to section 17-10.

(d) The commission on human relations is hereby authorized to:

(1) Review any complaint in accordance with procedures set forth in this chapter;

(2) Upon a finding of the commission that any contractor is in noncompliance with the provisions of subsection (a), the commission shall report such findings to the city manager, department of general services, and the contracting department.

(e) The city manager shall terminate or suspend or not renew, in whole or in part, as appropriate, the contractual relationship with the contractor; further provided, however, that the city manager may defer temporarily a suspension or termination if he finds that such suspension or termination may disrupt or curtail a vital public service, or would otherwise not be in the best interest of the city, in which case the city manager shall indicate a certain date when the relationship will be suspended or terminated, or when the practice complained about will be remedied.
(Code 1975, § 17.1-6)

* * * *

Supreme Court, U.S.
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No. 87-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

Whether the Equal Protection Clause prohibits the City of Richmond from remedying the effects of racial discrimination on minority participation in city construction contracts by enacting a temporary program that, subject to a waiver provision, requires contractors to subcontract a portion of their contracts to minority business enterprises.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-998

CITY OF RICHMOND,

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include municipal and county governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments. This case concerns the constitutionality of a temporary minority subcontracting program adopted by the City of Richmond, Virginia. The program provides that any firm awarded a construction contract by the City shall, unless it receives a waiver, subcontract 30% of the value of the contract to minority business enterprises.

This is a case of great importance to the *amici*. Programs comparable to Richmond's are very common among state and local governments. After the Court noted probable jurisdiction in this case, we undertook a survey of state, municipal, and county governments; the results are reproduced in the appendices to this brief.

The survey identifies 36 States and 190 local governments throughout the Nation that have adopted programs

that use a variety of devices, including numerical goals or targets, to expand minority access to government contracts. The vast majority of these programs were adopted after this Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which upheld a similar program enacted by Congress. Many of the programs, including Richmond's, were modeled on the federal program upheld in *Fullilove*. As we explain below (pages 7-10), the decision of the court of appeals in this case imposes more stringent requirements on state and local governments than *Fullilove* imposed on the federal government. Many state and local programs, therefore, would be jeopardized by the approach taken by the court of appeals, if it were to prevail.

These efforts by state and local governments represent a practical and constructive attempt to deal with the effects of discrimination at the level of government where such problems are best addressed. Because *amici* believe that it is exceptionally important that those efforts not be jeopardized, we offer this brief to assist the Court in its resolution of this case.[1]

STATEMENT

1. In April 1983, the Richmond City Council adopted a Minority Business Utilization Plan. The Plan provides that a contractor who is awarded a construction contract by the City shall, unless granted a waiver, subcontract at least 30% of the value of the contract to minority business enterprises (MBEs).[2] J.S. App. 2a. The City will grant a waiver if a "sufficient [number of] . . .

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk.

[2] The Plan contains a detailed definition of which businesses qualify as minority business enterprises. These provisions require that the firm be owned by members of minority groups and that it be either controlled or operated by minority group members. See J.S. Supp. App. 115-116, 251-252. A general contractor that is itself a minority business enterprise need not subcontract 30% of its contract to other MBEs. *Id.* at 247. The Plan requires the City to verify that an enterprise claiming to be an MBE is not a sham. See *id.* at 62.

qualified [MBEs] . . . are unavailable or are unwilling to participate in the contract." J.S. Supp. App. 67-68. The Plan is explicitly "remedial" (*id.* at 248) and temporary; it expires at the end of June 1988 (*ibid.*).

The City Council adopted the Plan after holding a hearing during which it received testimony and information about the history of public construction contracting in Richmond. The Council learned that during the preceding five years, only two-thirds of 1% of the dollar value of construction contracts awarded by Richmond was awarded to MBEs. J.S. Supp. App. 38, 115. The population of Richmond is approximately 50% minority. *Ibid.* The City Manager and a member of the City Council stated, on the basis of their experience, that there was widespread discrimination in the construction industry in general and in Richmond in particular; opponents of the Plan within the Council, and representatives of contracting associations who spoke at the hearing, did not dispute these statements. *Id.* at 38, 164-165.

2. In September 1983, the City invited bids on a project that involved the installation of certain plumbing fixtures in the City Jail. Appellee was the only bidder. After the bidding was closed, appellee sought a waiver of the requirement that it subcontract with an MBE. J.S. App. 2a-3a; J.S. Supp. App. 120-124. The City declined to grant the waiver and, when appellee sought to increase the price of its contract with the City, the City reopened the bidding on the contract. The City invited appellee to submit a new bid. J.S. App. 3a.

Instead, appellee brought this action, which was removed to the United States District Court for the Eastern District of Virginia. Appellee sought injunctive and declaratory relief and damages, claiming, among other things, that the Plan violated its rights under the Equal Protection Clause of the Fourteenth Amendment. The district court rejected appellee's claims (J.S. Supp. App. 110-232), and the court of appeals affirmed (*id.* at 1-109). This Court granted appellee's petition for a writ of certiorari, vacated the judgment of the court of ap-

peals, and remanded the case for reconsideration in light of *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). See 106 S.Ct. 3327 (1986).

3. On remand, a divided court of appeals reversed the judgment of the district court and held the Plan unconstitutional. J.S. App. 1a-26a. The majority acknowledged that a City may use a racial preference in order to "redress a practice of past wrongdoing" (J.S. App. 14a). But the majority ruled that the Richmond Plan was invalid because there was "no record of prior discrimination by the city" in this case. *Id.* at 6a. The majority explained that, for example, "[t]here has been no showing that qualified minority contractors who submitted low bids were passed over . . . [or] that minority firms were excluded from the bidding pool." *Id.* at 8a.

The majority further asserted that the statements made during the City Council hearing were not sufficient to support the Plan because they were "conclusory" and "highly general" (J.S. App. 6a). The majority also rejected as "spurious" (*id.* at 8a) the City's argument that an inference of discrimination was raised by the virtual absence of city contracts awarded to minorities, even though minorities constituted half the City's population. The majority stated that this disparity did not "demonstrate discrimination" because "[t]he appropriate comparison is between the number of minority contracts and the number of minority *contractors*" (*id.* at 7a; emphasis in original).

Finally, the majority concluded that even if the Plan were supported by the need to remedy past discrimination, it would be unconstitutional because "it is not narrowly tailored to that remedial goal." J.S. App. 11a. The majority asserted that the 30% figure was chosen "arbitrarily"; that the definition of an MBE was not narrowly tailored; that the provision for a waiver was too "restrictive"; and that the temporary nature of the plan was immaterial because "[w]hether the . . . [P]lan will be retired or renewed in 1988 is, at this point, nothing more than speculation." *Id.* at 11a-13a.

Judge Sprouse dissented. J.S. App. 14a-26a. The court of appeals denied rehearing en banc by a vote of 6-5. *Id.* at 27a-28a.

SUMMARY OF ARGUMENT

A. The decision of the court of appeals is inconsistent with *Fullilove v. Klutznick*, 448 U.S. 448 (1980). *Fullilove* upheld a federal program that is indistinguishable from Richmond's Minority Business Utilization Plan in every relevant respect. Moreover, the evidence supporting the Richmond Plan is stronger than the evidence adduced in *Fullilove*.

Fullilove cannot be distinguished on the ground that it involved the exercise of congressional power under Section 5 of the Fourteenth Amendment. The basis of Congress's broad Section 5 power is the concern that the States might fail to act against discrimination. Here, Richmond has acted to remedy discrimination. It would be paradoxical to interpret the grant of power to Congress in the Fourteenth Amendment in a way that reduces the authority of state and local governments to remedy racial discrimination. In addition, state and local remedies for discrimination have many practical advantages over remedies imposed by the more remote and less knowledgeable federal government.

B. Although *Fullilove* is sufficient to dispose of this case, the Richmond Plan also satisfies the standards prescribed in this Court's other decisions concerning race-conscious measures.

1. Richmond has a strong basis for concluding that racial discrimination in the construction industry affected minorities' access to City contracting opportunities. The most compelling evidence is that minorities, who are half of Richmond's population, received less than one percent of public construction contracting funds. The court of appeals' dismissal of that evidence is manifestly erroneous. In addition, Richmond had nonstatistical evidence of discrimination from several sources.

The court of appeals ruled that this evidence was inadequate because the Richmond City Council did not

make a "finding" or "showing" that identified particular discriminatory acts. This Court's decisions, however, establish that such findings are not required. In addition, requiring a government to identify discriminatory acts will inject an unnecessarily divisive and adversarial element into the process of designing remedies for racial discrimination.

A race-conscious remedy was a fully appropriate response to the discrimination that Richmond identified in the construction industry. Simply requiring that firms in the industry not discriminate would not have been effective. Because of prior discrimination, minority firms now lack experience; they would accordingly be at a competitive disadvantage even if there were no longer any discrimination at all. An effective remedy for the vestiges of discrimination must provide a temporary way to overcome that competitive disadvantage.

2. Contrary to the court of appeals, Richmond was entitled to adopt a race-conscious remedy for discrimination in the construction industry even if the City itself did not discriminate. As this Court has often held, state and local governments have a compelling interest of the highest order in remedying private discrimination. That interest is even greater when the City is attempting to ensure that its own funds will not be spent in a way that supports, or perpetuates the effects of, private discrimination. A race-conscious measure will sometimes be the only effective means of promoting these exceptionally important government interests.

3. Richmond's Plan does not unfairly burden nonminority contractors. To a large extent, the burdens imposed by the Richmond Plan fall on the taxpayers. In that respect, the Plan is superior to nearly every other affirmative action measure that this Court has considered. The burden on nonminority subcontractors who compete with minority firms is limited and diffuse. Moreover, the Richmond Plan does not uproot settled expectations but only denies, at most, the contingent possibility of future economic gain.

ARGUMENT

RICHMOND'S MINORITY BUSINESS UTILIZATION PLAN DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A. The Court Of Appeals' Decision Is Inconsistent With *Fullilove v. Klutznick*.

1. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), this Court held that Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. 6705(f)(2), does not violate the equal protection component of the Fifth Amendment's Due Process Clause. Section 103(f)(2) provided that 10% of the funds granted under the Act was to be used to procure services and supplies from MBEs. The Richmond Minority Business Utilization Plan was modeled on Section 103(f)(2), and it is indistinguishable from Section 103(f)(2) in every relevant respect. Indeed, the arguments supporting the Richmond Plan are significantly stronger than those advanced in support of Section 103(f)(2).

a. Section 103(f)(2) was supported by the same kind of statistical disparity as the Richmond Plan—a disparity between the percentage of minorities in the general population and the percentage of government contract funds received by minorities. The court below, without referring to *Fullilove*, condemned as "spurious" and "not . . . meaningful" the overwhelming disparity between the percentage of minorities in Richmond's population and the percentage of Richmond's public construction contract funds that had been awarded to minorities. J.S. App. 8a, 10a. But in *Fullilove*, a majority of the Members of this Court relied on precisely the same statistical comparison to support their conclusion that Section 103(f)(2) was a permissible remedy for past discrimination.[3]

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[3] See 448 U.S. at 459 (opinion of Burger, C.J.) ("in fiscal year 1976 less than 1% of all federal procurement was concluded with minority business enterprises, although minorities comprised 15-

Indeed, in *Fullilove* the statistical disparity—minorities were 15% to 18% of the population and received less than 1% of public contracting funds—was far less dramatic than the 0.67% to 50% disparity that Richmond faced. The conclusion that Richmond had an adequate statistical basis for enacting a subcontracting requirement therefore follows *a fortiori* from *Fullilove*.

b. The court of appeals ruled that the Richmond Plan was not narrowly tailored to its remedial objective because the City's waivable 30% goal was an "arbitrar[y] . . . figure [that] simply emerged from the mists." J.S. App. 11a. *Fullilove* rejected just such an attack on the 10% figure used by Congress. See, *e.g.*, Brief for Petitioner General Building Contractors, *Fullilove v. Klutznick*, No. 78-1007, at 22 ("Congress made a purely arbitrary selection" of a 10% requirement).

Justice Powell explained in *Fullilove* why Congress's choice of a 10% requirement was reasonable, and his explanation fully justifies the waivable 30% figure chosen by Richmond. Justice Powell explained that the 10% requirement of Section 103(f)(2) was warranted because that figure fell approximately "halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation." 448 U.S. at 513-514 (Powell, J., concurring). See also *id.* at 488-489 (opinion of Burger, C.J.). There were almost no minority contractors in Richmond (see J.S. Supp. App. 164), which has a minority population of 50%. The City's choice of a waivable 30% goal is therefore firmly supported by Justice Powell's reasoning.

18% of the population"); *id.* at 562-563 ("[The] 10% MBE participation requirement . . . was thought [by Congress] to be required to [avoid] . . . repetition of the prior experience . . . [in which] participation by minority business account[ed] for an inordinately small percentage of government contracting."); *id.* at 511 (Powell, J., concurring) ("By the time Congress enacted § 103(f)(2) in 1977, it knew that other remedies had failed . . . [because] the fact remained that minority contractors were receiving less than 1% of federal contracts."); *id.* at 520 (Marshall, J., concurring in the judgment).

c. The court of appeals' approach to the nonstatistical bases of the Richmond Plan is similarly irreconcilable with *Fullilove*. The court of appeals discounted the statements, made during the Richmond City Council's hearing, that the construction industry in Richmond had been marked by discrimination, on the ground that these statements were "conclusory," "general," and often made by supporters of the Plan. J.S. App. 6a. But in *Fullilove*, a majority of the Members of this Court relied extensively on statements of comparable generality made by supporters of Section 103(f)(2). Indeed, the statements on which the Court relied in *Fullilove* were, for the most part, made in connection not with Section 103(f)(2) but with other federal programs to aid minority enterprises. See 448 U.S. at 458-463 (opinion of Burger, C.J.); *id.* at 504 (Powell, J., concurring); *id.* at 520 (Marshall, J., concurring in the judgment).

d. The court of appeals ruled that the City's plan was invalid because the City had not made "showing[s]" (J.S. App. 8a) or "particularized findings" of prior discrimination (*id.* at 5a). But Chief Justice Burger explicitly noted in *Fullilove* that Section 103(f)(2) "recites no preambulary 'findings'" (448 U.S. at 478). Indeed, a majority of the Members of the Court emphasized that it is *inappropriate* to require a legislative body to produce specific findings to support the actions it takes.[4]

In *Fullilove*, of course, the question was whether Congress should be required to make specific findings. But

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[4] See 448 U.S. at 478 ("Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings."); *id.* at 502-503 (Powell, J., concurring) ("Congress is not expected to act as though it were duty bound to find facts and make conclusions of law. . . . [F]orc[ing] Congress to make specific factual findings with respect to each legislative action . . . would mark an unprecedented imposition of adjudicatory procedures upon . . . the legislative process."); *id.* at 520 n.4 (Marshall, J., concurring in the judgment) (The "view [that] Congress must make particularized findings . . . is fundamentally misguided.").

imposing such requirements on a state or local legislative body is at least as intrusive and unjustifiable. Cf. *FERC v. Mississippi*, 456 U.S. 742, 777-778 (1982) (O'Connor, J., dissenting). The inappropriateness of the requirement of specific findings stems from the nature of the legislative process itself. When elected representatives act, they bring to bear knowledge that they have gathered from a wide range of sources, including their general experience in public life and their contacts with constituents. This collective knowledge cannot be cabined in "findings" or "showings" about specific acts of discrimination.

e. The court below appears to have concluded that the Richmond Plan was invalid because it was not based on evidence of discrimination by the City itself. J.S. App. 5a, 6a, 8a, 9a. But there was no suggestion in *Fullilove* that Section 103(f)(2) was justified because of discrimination by the federal government, as a dissent in that case pointed out. 448 U.S. at 528 (Stewart, J., dissenting). Section 103(f)(2), like the Richmond Plan, was directed to discrimination in the construction industry and among the recipients of federal grants. See, *e.g.*, *id.* at 475, 478 (opinion of Burger, C.J.); *id.* at 505-506 (Powell, J., concurring).

2. The court of appeals did not attempt to reconcile its decision with *Fullilove* or to explain why state and local subcontracting requirements must meet standards that are stricter than those specified in *Fullilove*. Other courts of appeals, however, have asserted that Congress has greater power to remedy racial discrimination than state and local governments have. See, *e.g.*, *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922, 928-934 (9th Cir. 1987) (petition for rehearing pending).

a. The notion that Congress's authority to remedy discrimination is greater than that of state and local governments is unfounded in the law, and represents an unwarranted inversion of important values of federalism. It is true, of course, that Section 5 of the Four-

teenth Amendment greatly expanded the power of Congress to remedy racial discrimination. See *Katzenbach v. Morgan*, 384 U.S. 641, 650-651 (1966); *Ex Parte Virginia*, 100 U.S. (10 Otto) 339, 345-346 (1880). But the reason for this expansion was not to occupy the field or to preempt state and local action designed to remedy discrimination. Rather, the drafters of the Fourteenth Amendment expanded the power of Congress because they doubted that the States would adequately enforce the rights of the newly freed slaves to be free from unlawful discrimination.[5]

Against this background, it would be highly paradoxical to construe the Fourteenth Amendment to *reduce* the authority of state and local governments to deal with the problem of discrimination. The determination that racial discrimination was a national problem did not mean that it ceased to be a local problem. On the contrary, there is every reason to believe that the Framers of the Fourteenth Amendment would have welcomed state and local efforts to eradicate the effects of discrimination, where such efforts were forthcoming. Cf. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77-78 (1872) ("[T]he Fourteenth Amendment [did not] . . . transfer the security and protection of all the civil rights . . . from the States to the Federal Government"); see *Regents of the University of California v. Bakke*, 438 U.S. 265, 368 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

From a practical standpoint, local remedies for discrimination are likely to be far preferable to federal remedies. Congress lacks familiarity with local condi-

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[5] See, *e.g.*, *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70-71 (1872); Cong. Globe, 39th Cong., 1st Sess. 2768 (1866) (statement of Sen. Howard) (Section 5 "enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation"); R. Harris, The Quest for Equality 53 (1960); J. tenBroek, The Antislavery Origins of the Fourteenth Amendment 204-207 (1951); H. Flack, The Adoption of the Fourteenth Amendment 138 (1965).

tions; it acts on the basis of nationwide generalizations that will necessarily be over- and under-inclusive. For example, while some industries have a record of racial discrimination throughout the Nation, it is also sometimes the case that the firms in a particular locality have engaged in discrimination even though the industry has an excellent national record. Under the court of appeals' approach, the local government's power to act in such a situation will be sharply limited. Congress will be forced to choose between imposing a national solution, which may be excessive, and allowing the problem to go without remedy.

Similarly, a local government will be able to tailor its remedy to local conditions. For example, any nationwide numerical goal or target will be unrealistically high for areas of the country with a low minority population, and too low to be a fully effective remedy in areas with a high minority population. Local programs will not encounter this difficulty. Of course, a national goal may contain a waiver provision, as the Section 103(f)(2) program did. But if variations are to be made to accommodate local conditions, it is far better that they be adopted through local political processes than by the discretionary judgments of a federal administrator.

b. Nothing in the opinions in *Fullilove* suggests that the Fourteenth Amendment's expansion of Congress's authority restricts the power of state and local governments to remedy discrimination. Members of the Court did, of course, emphasize the scope of Congress's power to enforce the Fourteenth Amendment. See, *e.g.*, 448 U.S. at 483 (opinion of Burger, C.J.); *id.* at 499-502 (opinion of Powell, J). But they did so only to answer arguments that Congress might lack the power to act in this area. See, *e.g.*, *id.* at 476 (opinion of Burger, C.J.). State and local governments have always had the authority—under the police power and, as here, by virtue of their power to control public expenditures—to act against racial discrimination. The opinions in *Fullilove* do not suggest that the existence of Congress's power

under Section 5 somehow derogates from that traditional state and local authority.[6]

c. Perhaps most important, local solutions to the problems of racial discrimination have crucial political and social advantages over federal measures. When a decision is made at the local level, the officials responsible for it can be held directly politically accountable. Consequently, a decision by the elected officials of a state or local government reflects a decision by the people most directly affected to address the problem of racial discrimination in a certain way. The process of considering and enacting a remedy like Richmond's can help build a consensus. If circumstances change, the remedy can be modified. A federal requirement, by contrast, is imposed coercively from above. Ultimately the problems stemming from racial discrimination will be solved not by such coercive measures but by the development of a consensus and an understanding at the local level.

As we have noted (pages 1-2, *supra*), state and local governments throughout the Nation have determined, through their elected representatives, that public contracting requirements comparable to Richmond's will help to remedy the effects of racial discrimination. In these ways, *Fullilove* has become "an important part of the fabric of our law" (*Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1459 (1987) (Stevens, J., concurring); see *id.* at 1461 (O'Connor, J., concurring in the judgment)). It has become the basis for political and economic accommodation of the various interests that are affected when the government attempts to remedy the effects of discrimination—an accommodation that has

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[6] Thus Chief Justice Burger's statement that "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees" (448 U.S. at 483) must be taken to mean what it says: Congress's authority is *as broad as* that of state and local governments. The opinion does not say—and, in our view, it would be paradoxical and incorrect to say—that congressional power is broader.

taken place on the local level, in scores of localities and more than two-thirds of the States, throughout the Nation. There is no sufficient reason for upsetting these accommodations and precluding state and local governments from addressing the problem of discrimination in this way.

B. The Richmond Plan Promotes Compelling Government Interests And Does Not Impose Unfair Burdens On Nonminority Contractors.

Fullilove is, in our view, sufficient to dispose of this case. But there is no inconsistency between *Fullilove* and the standards established in the other decisions of this Court that have considered the constitutionality of race-conscious measures. Although the Court does not appear to have agreed on a specific formulation of these standards, it is clear that such a measure is constitutional if it is designed to achieve a sufficiently important government objective and if it is tailored so as not to impose undue burdens on individuals who are not members of minority groups.[7]

The Richmond Plan satisfies these standards. Indeed, although we do not believe that a state or local government must show a "compelling" interest in order to sustain a race-conscious remedy, the objectives that the Richmond Plan promotes are in fact compelling, and the burdens it imposes on nonminorities are minimal.

1. *The Richmond Plan promotes the compelling interest of remedying racial discrimination in the construction industry.*

The Richmond City Council explicitly stated that it was adopting the Minority Business Utilization Plan for the purpose of remedying prior racial discrimination. The court of appeals did not deny that the Plan would

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[7] See, *e.g.*, *United States v. Paradise*, 107 S. Ct. 1053, 1064 & n.17 (1987) (plurality opinion); *Wygant*, 476 U.S. at 274 (plurality opinion); *id.* at 286-287 (O'Connor, J., concurring); *id.* at 301-302 (Marshall, J., dissenting); *id.* at 313 (Stevens, J., dissenting).

be an effective means of remedying the effects of discrimination in the construction industry. Instead, the court ruled that Richmond did not have an adequate basis for concluding that such discrimination exists. In this section we address that aspect of the court of appeals' decision. In addition, we will explain why a race-conscious subcontracting requirement like Richmond's is an especially useful means—indeed, an indispensable means—of remedying discrimination in the construction industry.

The court of appeals also suggested that Richmond was entitled to remedy only its own discrimination, and that remedying discrimination in the construction industry did not constitute a sufficient government interest to uphold the Richmond Plan. We address that aspect of the court of appeals' reasoning in Part B2 below.

a. *i.* In *Wygant*, Members of this Court stated that a government may adopt a race-conscious remedy for past discrimination when it "ha[s] a strong basis in evidence for its conclusion that remedial action [is] necessary." 476 U.S. at 277 (plurality opinion). See also *id.* at 293 (O'Connor, J., concurring) ("a firm basis for concluding that remedial action [is] appropriate"). The Richmond City Council had more than a "strong basis" for concluding that there was discrimination in the construction industry. Perhaps the clearest evidence was the stark statistical disparity: minorities constitute half of Richmond's population, but have received only two-thirds of 1% of public construction contract funds.

The court of appeals dismissed this statistical demonstration as "spurious" (*id.* at 8a) and "not . . . meaningful" (*id.* at 10a). "The appropriate comparison," the court asserted, "is between the number of minority contracts and the number of minority *contractors*" (*id.* at 7a; emphasis in original). The court of appeals stated that the City's "[s]howing that a small fraction of city contracts went to minority firms," did not "demonstrate discrimination" because "the number of minority-owned contractors in Richmond was also quite small." *Ibid.*

This ruling is manifestly incorrect. The error in the court of appeals' approach is clear from numerous decisions of this Court, and it was recently explained by Justice O'Connor: when discrimination prevents minorities from "obtaining th[e] experience" that they need to qualify for a position, the "relevant comparison" is not with the percentage of minorities in the pool of qualified candidates but with "the total percentage of [minorities] in the labor force." *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1462 (1987) (opinion concurring in the judgment). See also *id.* at 1462-1463; *Steelworkers v. Weber*, 443 U.S. 193, 198-199 (1979); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977). Discrimination does not merely prevent established minority contractors from obtaining contracts; it discourages and prevents minorities from entering the pool of contractors in the first place. The absence of the disparity on which the court of appeals insisted may simply be evidence that minorities, faced with widespread discrimination, did not quixotically enter a business in which they knew they would not be allowed to succeed.

An individual who wishes to take advantage of subcontracting opportunities must expend considerable resources. Such an individual ordinarily must incorporate, obtain bonding, hire managerial employees, buy or lease equipment, establish contacts with union hiring halls or other sources of labor, arrange credit, investigate bidding opportunities, and determine the bid that the newly formed firm can enter. These are costly operations. If there is discrimination at any stage—in the discretionary decisions of general contractors, in the practices of bonding companies, in the judgments banks or equipment leasing companies make about creditworthiness, in the willingness of skilled or unskilled laborers to work for a minority business—the minority group member is immediately placed at a competitive disadvantage. In these circumstances, few minority entrepreneurs will be willing to invest the necessary resources to establish a contracting

firm. They will pursue opportunities in a different field, where discrimination may be less of an obstacle to success.[8]

Significantly, these barriers continue to exist after acts of intentional discrimination have ceased. "[B]arriers to competitive access ha[ve] their roots in racial and ethnic discrimination, and . . . continue today, even absent any intentional discrimination or other unlawful conduct." *Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.). Experience—a "track record"—is highly important to any firm seeking contracting opportunities. *Id.* at 467. A network of contacts and a prior working relationship can be crucial in obtaining credit, bonding, or high-quality employees. See *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 570, 572 (1978) (describing hiring by construction "job superintendent" who "hired only persons whom he knew to be experienced and competent in th[e] type of work or persons who had been recommended to him as similarly skilled").

Indeed, it is often rational, and not an act of racial discrimination, for general contractors, banks, and others to give preferential treatment to firms that have an established record of reliability. This case furnishes an example: the district court found that a minority subcontractor interested in obtaining part of appellee's contract could not obtain a timely price quotation from a supplier because the minority entrepreneur "was unknown to" the supplier, and the supplier's agent "was not allowed to quote to unknown [firms] until they had undergone a credit investigation." J.S. Supp. App. 123. Because discrimination has prevented minorities from entering the field in the past, minority firms will continue to suffer the competitive disadvantages caused by relative lack of experience even if there is no longer any

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[8] On several occasions, this Court has recognized that entrenched hiring discrimination will deter minorities from applying for jobs. See, *e.g.*, *Local 28 of Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3036-3037 (1986); *Teamsters*, 431 U.S. at 365-367. It follows *a fortiori* that discrimination will discourage minorities from forming contracting firms, a much more expensive and difficult task.

intentional discrimination at all. Minority group members will, accordingly, be unwilling to establish firms, and the disparity on which the court of appeals insisted will not appear.

Of course, it is theoretically possible that these barriers were not the source of the virtual exclusion of minorities from Richmond's public contracting business. But it is extremely unlikely. See *Teamsters*, 431 U.S. at 342 n.23; *Johnson*, 107 S. Ct. at 1465 (O'Connor, J., concurring in the judgment). Faced with the undisputed fact that there were essentially no minority contractors in a City that was half minority, the Richmond City Council could have concluded either that virtually no minorities were willing and able to become contractors, or that some appreciable percentage had been excluded by discrimination. The Council, with its intimate knowledge of the City's history, thought the latter hypothesis was more plausible. There is no justification for denying the City the right to reach this conclusion.

ii. In addition to the statistical evidence, the Richmond City Council had other reasons to believe that discriminatory practices had denied minorities opportunities in the construction industry. For example, a member of the City Council, as well as the City Manager, speaking from experience, stated their judgment that there had been widespread discrimination in the construction industry. J.S. Supp. App. 38, 164-165. In addition, the discriminatory exclusion of minorities from craft unions is so notorious that this Court has held it a proper subject for judicial notice. *Weber*, 443 U.S. at 198 & n.1. Craft unions supply employees to construction firms, and often new construction firms are formed by craft workers.[9] Thus the historic discrimination against minorities by the craft unions is likely to have had a severe effect on minorities' opportunities in the construction industry. Finally, as the district court noted (J.S. Supp. App.

[9] See, *e.g.*, J. Gillies & F. Mittelbach, Management in the Light Construction Industry 27, 28 (1962); see generally R. Glover, Minority Enterprise in Construction (1977).

165), the City had before it the same evidence that Congress had when it enacted the *Fullilove* program—"abundant evidence from which [a legislature] could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination," and "direct evidence" that a "pattern of disadvantage and discrimination existed with respect to state and local construction contracting" (*Fullilove*, 448 U.S. at 477-478 (opinion of Burger, C.J.)).

The court of appeals considered this nonstatistical evidence insufficient because it was not captured in adequately "particularized findings" (J.S. App. 5a). As we noted above, this conclusion is inconsistent with *Fullilove*, and it ignores the realities of the legislative process. The court of appeals relied exclusively on *Wygant* for its contrary conclusion, but one Members of the five-Justice majority in *Wygant* fully explained why specific findings of prior discrimination should not be required. 476 U.S. at 289-293 (O'Connor, J., concurring). And it appears that a majority of the Court in *Wygant* rejected a requirement that a government must make formal findings of discrimination before adopting a race-conscious remedy. See *id.* at 312 n.7 (Marshall, J., dissenting).

The court of appeals rejected the City's reliance on the data developed by Congress with the statement that "[n]ational findings do not alone establish the need for action in a particular locality." J.S. App. 9a. But in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), a case involving an ordinance that arguably affected First Amendment rights, this Court squarely rejected—as "unnecessarily rigid"—the contention that because the City had not presented "studies specifically relating to 'the particular problems or needs of Renton,' the city's justifications for the ordinance were 'conclusory and speculative.'" *Id.* at 50 (citations omitted). This is

almost precisely the contention that the court below accepted.

Renton held that a City is "entitled to rely on the experiences of . . . other cities" even when it is regulating in an area involving constitutional rights. *Id.* at 51. A City is not required "to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52. The statistical evidence of discrimination in Richmond gave the City ample reason to believe that the congressional findings were relevant to its situation.

Finally, the court of appeals' approach is insensitive to important practical considerations that affect state and local governments. First, as a practical matter, a requirement that a City compile a "record" or make specific "findings" with an eye toward judicial review will place all but the largest localities at an unwarranted disadvantage. Translating the insights, experience, and judgment of an elected official into a "record" or "particularized findings" suitable for judicial review is a task for a professional staff, preferably a staff with an extensive legal background. Congress and the Executive Branch of the federal government employ staffs that are adept at compiling a record that will withstand the kind of review that the court of appeals' opinion contemplates. But many medium-size and small localities—whose deliberations may be every bit as careful and thoughtful—do not employ, and cannot afford to employ, that kind of professional staff.

Second, and more important, the court of appeals' approach ignores the nature—and the special advantages—of the political process. The court of appeals appears to have required that state and local governments identify particular occasions on which identifiable acts of discrimination occurred. See, *e.g.*, J.S. App. 8a ("There has been no showing that qualified minority contractors who submitted low bids were passed over. There has

been no showing that minority firms were excluded from the bidding pool.").

Such a procedure—in which specific discriminatory acts or actors are identified—would benefit no one. It would require state and local governments to engage in a destructive process of recrimination and accusation if they wished to address the effects of racial discrimination through a race-conscious remedy. The genius of the political process is that it can often find a solution, even to problems as difficult as those implicated in this case, without reopening old wounds and setting individuals against each other. See *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221 n. 10 (1974) ("The legislative function is inherently general rather than particular and is not intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves."). The divisive process envisioned by the court of appeals would forfeit these advantages.

b. A race-conscious subcontracting requirement is a fully appropriate remedy for the discrimination that Richmond found to exist in the construction industry. A measure that simply required the firms involved in the construction industry not to discriminate would not have been effective. Indeed, we do not understand the court of appeals to have suggested otherwise.

As we noted above, and as Members of the Court explained in detail in *Fullilove*, discrimination in the construction industry creates a variety of subtle but severe barriers to competitive success. Intentional discrimination can handicap a construction firm in ways that a mere prohibition against discrimination cannot prevent, no matter how diligently it is enforced. More important, even after intentional discrimination has ceased, minority firms will continue to suffer from its effects. A simple prohibition against discrimination will do nothing to remedy those effects. See pages 16-18, *supra*; *Fullilove*, 448 U.S. at 461-467, 477-478 (opinion of Burger, C.J.).

For example, as we have noted, a rational, nondiscriminatory general contractor will often prefer to

give work to a subcontractor with which it has worked on previous projects and which it knows to be reliable. A bank or a bonding company will have nondiscriminatory reasons for giving better terms to firms with a long record of reliable performance. Informal networks, developed over years of working together, will often be the best means of hiring good employees. See pages 17-18, *supra*.

In each of these areas, minority firms are at a competitive disadvantage because they lack experience and contacts; and they lack experience and contacts because of past discrimination. This disadvantage cannot be overcome simply by banning discrimination. It can be overcome only by a compensatory remedy that improves the competitive position of minority firms.

Richmond's subcontracting requirement accomplishes this task in a measured, tailored fashion. It is a temporary device; the City will reassess the need for a race-conscious remedy before extending it. It does not guarantee any particular contract to any minority firm. Because of the waiver provision, minority firms have an incentive to be as efficient as possible; if their costs are too high, a general contractor may obtain a waiver. Moreover, as the district court explained (J.S. Supp. App. 145-146):

> [U]nder the Plan, there remains every incentive for both MBEs and non-MBEs to compete against one another. . . . The Plan simply changes the structure of the competition, by requiring non-MBEs to team up, insofar as possible, with MBEs, to compete for contracts against other teams of non-MBEs and MBEs.

The Richmond Plan does, however, ensure that a general contractor will not lose a job because it has subcontracted with a minority firm that has higher costs as a result of past discrimination. And, of course, the Richmond Plan requires general contractors to make real efforts to seek out minority firms; it does not permit a general contractor to make a merely perfunctory effort before returning to the traditional ways of doing business.

2. *Richmond may enact a race-conscious remedy for prior discrimination in the local construction industry without admitting complicity in racial discrimination.*

As we have explained, the Richmond City Council had more than sufficient basis for concluding that racial discrimination in the construction industry blocked minority access to city construction contracts, and the Richmond Plan was well designed to remedy this situation. But passages in the opinion below suggest that the court imposed an additional requirement on Richmond: the City, the court of appeals suggested, could enact a race-conscious plan only to remedy its own prior discrimination. The Richmond Plan, according to the court of appeals, could not be justified as a remedy for discrimination in the construction industry, no matter how conclusively Richmond demonstrated the existence of that discrimination, unless the City itself was in some sense guilty of discrimination. See J.S. App. 5a, 6a, 8a, 9a.

This conclusion is erroneous. In some circumstances, a local government is obligated to use race-conscious means to remedy its own discrimination. *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 46 (1971); see also *Green v. County School Board*, 391 U.S. 430 (1968). The question in this case, however, is not what a state or local government is obligated to do but what it *may* do. It is well established that a state or local government not only may act to remedy private discrimination but has the most compelling interest in doing so. Moreover, both logic and this Court's decisions support the conclusion that a state or local government may use race-conscious measures to remedy private discrimination and its effects.

a. This Court has repeatedly recognized that governments have an interest of the highest order in eliminating private discrimination and its effects. See, *e.g.*, *Board of Directors v. Rotary Club*, 107 S. Ct. 1940, 1947 (1987) ("the State's compelling interest in eliminating discrimination against women"); *Bob Jones University*

v. United States, 461 U.S. 574, 604 (1983) ("[T]he government has a fundamental, overriding interest in eradicating racial discrimination"); *Runyon v. McCrary*, 427 U.S. 160, 179 (1976); *Railway Mail Association v. Corsi*, 326 U.S. 88 (1945). Indeed, the Court has recently ruled that a State government's interest in "eliminating discrimination and assuring its citizens equal access to publicly available goods and services"—an interest similar to that asserted by Richmond in this case—is not only a "compelling state interest[] of the highest order" (*Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984)), but is sufficiently weighty to justify the infringement of a constitutional right (see *id.* at 623). See also *id.* at 632 (O'Connor, J., concurring) ("the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society").

b. The City's interest in combatting private discrimination is even stronger in this case, because the City is attempting to ensure that its own expenditures of public funds do not contribute to the harms caused by discrimination. Richmond is not acting merely as a regulator of private affairs, as the States were in *Roberts*, *supra*, and *Rotary Club*, *supra*; instead, the City is attempting to prevent its own spending decisions from supporting subtle forms of discrimination or perpetuating the effects of past discrimination. The Court has recognized that a local government has unusually great latitude to promote its interests when it is not acting in a regulatory capacity but is, for example, "expend[ing] only its own funds in entering into construction contracts for public projects" (*White v. Massachusetts Council of Construction Employers*, 460 U.S. 204, 214-215 (1983)). See also *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-437 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). When, as here, the City is attempting to avoid giving support to private racial discrimination and its effects, the City's power is at its greatest.

We note in this connection that several courts have held that a state or local government can violate the Con-

stitution by entering into contractual relationships with private firms that discriminate.[10] See also *National Black Police Association v. Velde*, 712 F. 2d 569 (D.C. Cir. 1983) (officials are subject to personal liability if they knowingly provide public funds to recipients engaged in discrimination), cert. denied, 466 U.S. 963 (1984). While we do not agree with these decisions, they further establish the extraordinary weight of state and local governments' interest in ensuring that public funds are not spent in a way that perpetuates racial discrimination or its effects. Cf. *Norwood v. Harrison*, 413 U.S. 455 (1973).

c. In view of the extraordinary importance of the government's interest in eliminating private discrimination and its effects, it would be unreasonable to preclude state and local governments from using race-conscious measures in appropriate circumstances. The Court has approved race-conscious remedies for government discrimination because there are occasions on which government discrimination, and its effects, cannot be eliminated without such measures. See, *e.g.*, *North Carolina State Board of Education*, *supra*; *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971).

The same is sometimes true of private discrimination. As the Court has recognized, sometimes a mere requirement of nondiscrimination is not enough to prevent such discrimination or to alleviate its effects. See, *e.g.*, *Local 28 of Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3036-3037 (1986); *Fullilove*, *supra*. See also *Paradise*, 107 S. Ct. at 1065-1072. The Court has specifically stated that a school board may voluntarily remedy de facto segregation—segregation that is not the result of discrimination by the government—by adopting a race-conscious student assignment policy. *Swann v. Charlotte-Mecklen-*

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[10] Notably, many of these cases involved the construction industry. See, *e.g.*, *Percy v. Brennan*, 384 F. Supp. 800, 811-812 (S.D.N.Y. 1977); *Byrd v. Local No. 24, IBEW*, 375 F. Supp. 545, 559-560 (D.Md. 1974); *James v. Ogilvie*, 310 F. Supp. 661 (N.D. Ill. 1970); *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967).

burg Board of Education, 402 U.S. 1, 16 (1971). See also *North Carolina State Board of Education*, 402 U.S. at 45.

We of course recognize that race-conscious measures must not be imposed casually, for whatever reason they are adopted. They must be supported by appropriate government interests. Moreover, the government must take care that they do not unfairly burden nonminorities. But there is no basis for wholly prohibiting state and local governments from using such measures to remedy discrimination in appropriate cases, even if the discrimination does not have its source in the government's own actions.

d. The court of appeals' conclusion that a state or local government is limited to remedying its own discrimination was based entirely on statements from *Wygant*. See J.S. App. 5a, quoting 476 U.S. at 274 (plurality opinion of Powell, J.). See also *Wygant*, 476 U.S. at 288 (opinion of O'Connor, J.). Understood in context, however, these statements do not support the court of appeals' conclusion.

Wygant involved a provision of a collective bargaining agreement under which a school board, in making layoffs, was to maintain a certain racial balance among teachers. See 476 U.S. at 270-272 (plurality opinion). That affirmative action provision, if analyzed as a remedial measure, was capable of being justified only in one of two ways—as a remedy for prior discrimination by the school board, or as a general response to the fact that widespread discrimination in society has placed racial minorities in a disadvantaged position. See *id.* at 288 n.* (opinion of O'Connor, J.).[11]

Justices Powell and O'Connor were concerned to reject the suggestion that this latter notion of societal discrimination could justify the provision. Justice Powell reasoned that such a justification is "too amorphous" and

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[11] The school board also suggested that the measure could be justified on the ground that it provided "role models" for schoolchildren (see 476 U.S. at 274 (plurality opinion)), but that is a nonremedial justification that has no counterpart in this case.

"overexpansive"; because "[n]o one doubts that there has been serious racial discrimination in this country," any remedies based on this notion of societal discrimination would be "ageless in their reach into the past, and timeless in their ability to affect the future." *Id.* at 276 (plurality opinion).

It was in this context—in which the only suggested remedial justifications were an open-ended notion of societal discrimination, on the one hand, and "discrimination by the local government unit in question" on the other—that Justices Powell and O'Connor insisted on the latter. Richmond, however, did not enact its Plan on the basis of an open-ended assertion of societal discrimination. Rather, Richmond is attempting to remedy discrimination in a specific industry, on the basis of abundant evidence (including evidence of which this Court has taken judicial notice) that such discrimination exists. Such a remedial effort does not present the problems of limitlessness and amorphousness with which Justices Powell and O'Connor were concerned.

This interpretation of the statements in *Wygant* is confirmed by Justice Powell's opinions in both *Bakke* and *Fullilove*. In *Bakke*, Justice Powell contrasted "identified discrimination" with " 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." 438 U.S. at 307. In *Fullilove*, where there was no suggestion of prior discrimination by the federal government, Justice Powell again emphasized that "identified" discrimination was sufficient to uphold the race-conscious remedy. See 448 U.S. at 496, 497, 515. This demonstrates that Justice Powell's concern was that the discrimination be "identified"—that is, that it be narrower than general societal discrimination—not that it be attributable to the government actor in question. In *Wygant*, the only form of identified discrimination was discrimination by the unit of government itself. Richmond, however, is addressing another form of identified discrimination. Its Plan is therefore fully consistent with Justice Powell's approach.

3. *Richmond's plan does not unfairly burden nonminority contractors.*

The Court has emphasized that race-conscious remedial measures must not impose undue burdens on nonminorities. See, *e.g.*, *Johnson*, 107 S. Ct. at 1455-1456; *Wygant*, 476 U.S. at 282-284 (opinion of Powell, J.). The burdens that the Richmond Plan imposes on nonminorities can fairly be characterized as minimal. At all events, they are well within the range permitted by this Court's decisions.

To a large extent, the burdens imposed by the Richmond Plan fall on the City itself. They are therefore distributed among the taxpayers. Not only is this perhaps the fairest way of dealing with the costs of remedying discrimination, but it ensures that there will be a political check on the program. If its costs grow too great, not isolated individuals but the taxpayers as a whole will demand that the Plan be modified or repealed. Because it spreads much of its cost among the taxpayers, the Richmond Plan is superior to nearly every other remedial measure that this Court has considered; those measures imposed virtually the entire burden on specific individuals and shifted little or none of it to the taxpayers (or to a comparably large group).[12]

The principal burden of the Richmond Plan falls on the taxpayers because a general contractor can include

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[12] In the cases involving competitive seniority—*Wygant*, *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), and also, in important respects, *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976)—the burden fell entirely on the nonminority employees who lost the benefits of their seniority; it is difficult to identify any burden that fell on the employer or could be passed on to taxpayers or customers. In cases involving affirmative action in hiring, promotions, or university admissions—*Paradise*, *Johnson*, *Local No. 93, Firefighters v. Cleveland*, 478 U.S. 501 (1986), *Local 28 of Sheet Metal Workers*, *Weber*, and *Bakke*—the government or employer incurred, in theory, the additional cost of employing or educating a minority applicant who was supposedly less well-qualified. But in practical terms that cost is not likely to be great. Realistically, the burden fell on the disappointed applicant.

in its bid—and thereby pass through—any additional costs that reflect the competitive disadvantage of the minority subcontractors. Neither the general contractor, nor any bonding or lending institution, nor any other firm that deals with the minority subcontractor, is forced to incur additional net costs.

It is of course true that the Plan is likely to cause some nonminority subcontractors to lose business. But in this respect, as well, the Plan contrasts sharply, and favorably, with the measures that this Court has invalidated in the past. The collective bargaining agreement in *Wygant*, for example, resulted in layoffs of nonminority employees whose seniority would otherwise have protected them. This aspect of *Wygant* was crucial to the outcome of that case. See 476 U.S. at 282-284 (Powell, J.); *id.* at 294-295 (White, J., concurring).

By contrast, the burden imposed on individual firms by the Richmond Plan—like the burden imposed by the federal program upheld in *Fullilove*—is "limited and so widely dispersed that it[] . . . is consistent with fundamental fairness." *Fullilove*, 448 U.S. at 515 (Powell, J., concurring) (footnote omitted). The Richmond Plan affects only the construction industry, only a segment of that market—municipal contracts—and only 30% of the dollar volume of that segment. We know of nothing in the record that suggests that any costs that the Richmond Plan imposes on nonminority contractors will be concentrated on a few firms. Moreover, far from uprooting settled expectations acquired through years of seniority, the Richmond Plan threatens only the contingent possibility of future economic gain. This interest, as the Court has emphasized, has always been entitled to only minimal legal protection. See, *e.g.*, *Andrus v. Allard*, 444 U.S. 51, 66 (1979); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 778 (1976); *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 308-309 (1927) (Holmes, J.).

Finally, since Richmond had ample reason to conclude that there was substantial discrimination in the con-

struction industry, "it was within [the City's] power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities." *Fullilove*, 448 U.S. at 485 (opinion of Burger, C.J.). As we noted, following Justice Powell's logic in *Fullilove*, the 30% figure chosen by Richmond was a reasonable estimate of the amount of City contracting dollars that would have reached minorities in the absence of discrimination. See page 8, *supra*. There is reason to believe, therefore, that the nonminority firms that are disadvantaged by the Richmond Plan may be losing only opportunities that they would not have had in the absence of prior discrimination.

CONCLUSION

The judgment of the court of appeals should be reversed.

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APPENDIX I

Minority Business Enterprise Programs of State Governments [1]

State	Citation	Coverage	Goals
Alabama	Exec. Order No. 89 (1978)		[2]
Arkansas	Exec. Order No. 83-2	Goods and services	10%
	Ark. Stat. Ann. §§ 5-916.2 to 5-916.6	Creates MBE office; defines functions	
	Exec. Order Proc. EO83-2	Goods and services	10%

[1] In addition to the procurement measures listed in the Table, Alaska law provides for an employment preference for "economically disadvantaged minority residents" in areas of the State suffering from underemployment. The Labor Commissioner identifies zones of underemployment. In those zones, residents who are "economically disadvantaged minority residents" have a preference for 25% of the jobs or a percentage representative of the number of minority citizens in the zone, whichever is greater. Alaska Stat. § 36.10.170 (1987).

Georgia allows an income tax credit of 10% of payments made by contractors to MBE subcontractors. H.B. 635 A/P, S.B. 48-7-38, eff. Jan. 1, 1985.

Kansas has established an Office of Minority Business to offer advice and technical assistance to MBEs; the office helps locate resources and acts as a minority advocate.

[2] The 1978 Executive Order created a Department of Small and Minority Business Enterprise to encourage those businesses. The policy was to be "implemented by all State agencies, departments and institutions by purchasing a fair proportion of the supplies, commodities and services required . . . ."

State	Citation	Coverage	Goals
Arizona	Exec. Order No. 87-9 (10/22/87)	All contracts	[3]
California	Cal. Gov't Code §§ 8790.70 - 8790.87 (West 1987)	All contracts for construction, professional services, materials, supplies, equipment, and repairs	15%
	Cal. Gov't Code § 14132, eff. Jan. 1, 1989, 1988 Cal. Stat. ch. 9	Highway construction	15%
	Cal. Gov't Code § 14839 (West 1987)	Establishes Office of Small and Minority Business	
	Cal. Gov't Code § 16850, eff. Jan. 1, 1989, 1988 Cal. Stat. ch. 61	Professional bonding services	15%
	Cal. Pub. Cont. Code § 10108.5, eff. Jan. 1, 1989 (West 1988)	State prison facilities	15%

	Cal. Pub. Cont. Code § 10115, eff. Jan. 1, 1989, 1988 Cal. Stat. ch. 61	All state contracts except highway construction	15%
	Cal. Pub. Cont. Code § 10470 (West 1988)	Correctional facilities	15%
	Cal. Sts. & Hy. Code §§ 94.3, 94.4 (West 1987)	MBE certification provision	
	Cal. Pub. Cont. Code § 2000 (West 1987)	Permits local agencies to establish MBE goals for local purchases	
Colorado	Exec. Order (Dec. 10, 1987)	State procurement	17%
Connecticut	Conn. Gen. Stat. Ann. § 32-9e (1987)	Construction, goods, and services	15-25%
Florida	Fla. Stat. Ann. § 287.042 (West 1988)	Construction, contractual services, commodities	15%

[3] The Executive Order expands the Governor's Office of Affirmative Action to encompass minority and women owned business enterprises. The office is "to facilitate, preserve and strengthen minority and womens business enterprises and ensure their full participation in the State of Arizona's free enterprise system."

State	Citation	Coverage	Goals
(Fla. cont.)	Fla. Stat. Ann. § 287.093 (West 1987)	Authorizes set-asides by counties, cities, and school districts in purchases of goods and services	10%
Illinois	Ill. Stats. Ann. ch. 127, ¶ 132-600 *et seq.* (Smith-Hurd 1985)	State contracts	10%
Indiana	Ind. Code § 4-13-16.5-2(e) (7) (Michie 1987)[4]	State constracts	5%
Iowa	Iowa Code § 314.14 (West 1985)	Highway construction	10%
Kentucky	Ky. Rev. Stat. §§ 45.470 - 45.510 (Michie 1986)	Goods, services, and construction	[6]
Louisiana	La. Rev. Stat. Ann. §§ 39:1951 to 39:1991 (West 1987)[6]	Public works, goods, and services	10%

	La. Rev. Stat. Ann. § 38:2233.2 (West 1987)	Authorizes local government set-aside programs	10%
Maryland	Md. State Fin. & Proc. Code Ann. § 18-601 (Michie 1985)	Transportation construction contracts over $100,000	10%
		All other state procurement	10%
Massachusetts	Exec. Order No. 237 (1984); Mass. Gen. Laws Ann. ch. 23A, §§ 39-44 (West 1987); and	Goods, supplies, and services	5%
		Construction	10%

[4] The State information brochure, *Indiana/We'll Help You Make It*, states that the "MBE program relies on voluntary goal setting by individual state agencies for increasing minority participation in contracts."

[5] Kentucky's Small or Small Minority Business Purchasing Act sets no specific goals. The Act provides that the Finance and Administration Cabinet set aside contracts for minority business enterprises if the Cabinet can identify 3 minority businesses that can reasonably be expected to bid and the businesses are "capable of furnishing the desired property or services."

[6] Louisiana's Minority Business Enterprise Act deals with procurement. Louisiana's Minority Development Act (La.Rev.Stat.Ann. §§ 51:1751 - 51:1765) defines "minority business enterprise," sets up an authority and a fund, and authorizes loan guarantees to MBEs.

State	Citation	Coverage	Goals
(Mass. cont.)	Mass. Admin. Reg. 509 (1984)		
Michigan	Mich. Stat. Ann. § 3.540 (51), (52) (Callaghan 1985)	Construction, goods, and services	7% [7]
Minnesota [8]	3 A Minn. Stat. Ann. § 16B.19 (5), (6); § 16B.22 (1986)	All procurement	9%
Missouri	Mo. Ann. Stat. § 33.752-5 (7) (Vernon 1988)	State contracts	[9]
Nebraska	Exec. Order (Jan. 16, 1984)	State contracts	[10]
New Jersey	N.J. Stat. Ann. § 52:32-21 (West Supp. 1987)	Goods, equipment, construction, and services	7% [11]
	N.J. Stat. Ann. § 58:11B-26 (West Supp. 1987)	Wastewater treatment trust: Local government purchases	10%
	N.J. Stat. Ann. §§ 5:12-184 - 5:12-190	Purchases of goods and services by casinos	15%

	(West Supp. 1987); 1987 N.J. Sess. Law Serv. ch. 137 (West)		
New Mexico	Exec. Order No. 83-52 (1983)[12]	Each Cabinet Department	Negotiated fair share (no numeric goals)

[7] The Michigan statute (Mich.Stat.Ann. §§ 3.540(31)-3.540(35)) authorizes a Minority Business Enterprise Division within the Department of Commerce. The Division must develop plans and specific program goals. The procurement policy requires a goal of "not less than 7%." Mich.Stat.Ann. §§ 3.540(51), (52).

[8] The Minnesota statute authorizes a set-aside for the "socially and economically disadvantaged," including "racial minorities, women, or persons who have suffered a substantial physical disability."

[9] Mo.Ann.Stat. §§ 33.750 - 33.755 creates a Minority Business Development Commission. Mo.Ann.Stat. § 33.752-5(7) states that it is the duty of the Commission to "[e]stablish as a goal that state contracts be let to racial minority businesses." The statute contains no specific percentages.

[10] Article IV of the Executive Order requires each department to prepare an Affirmative Action Plan of Implementation for the Internal/External Contract Compliance Program. The plan "shall facilitate the promotion and enhancement of economic opportunities for all disadvantaged businesses and members thereof."

[11] The New Jersey Set Aside Act for Small Businesses, Female Businesses, and Minority Businesses (N.J.Stat. Ann. §§ 52:32-17 to 52:32-30) states that at least 25% of state purchases of goods, equipment, services, or construction must be purchased from small (15%), minority (7%), or female (3%) businesses. The 1987 legislature established a grant program to counties and municipalities for pilot programs to assist in the development of small, minority, and women owned businesses. 1987 N.J. Sess.Law Serv. ch.56 (West).

[12] As of April 18, 1988, a new executive order is pending.

State	Citation	Coverage	Goals
New York	N.Y. Gen. Mun. Law §§ 955 - 969 (McKinney 1986)		[13]
	N.Y. Transp. Law § 428(2) (McKinney 1983)		
	N.Y. Unconsol. Laws § 6267 (McKinney 1983)		
	Exec. Order No. 21 (1983)	State construction contracts, goods, and services	12%
North Carolina	N.C. Gen. Stat. § 136-28.4 (Michie 1987) [14]		
	Exec. Order No. 34 (1987)	Contract purchases	4%
Ohio	Ohio Rev. Code Ann. §§ 122.71(e); 123.151; 125.081 (Page 1984) [15]	Construction	5%

Oklahoma	Okla. Stat. Ann. tit. 74, § 85.45c (West 1987)	Goods and services	10% [16]
Oregon	Or. Rev. Stat. §§ 200.005 - 200.085 (1987)	[17]	

[13] The New York State Economic Development Zones Act defines an MBE and provides that economic development zone plans must contain a description of programs to stimulate MBEs. N.Y. Gen.Mun. Law 962(h). MBEs must also be given an opportunity for "meaningful participation" in a "fair share of contracts" for New York City transit projects. N.Y. Pub. Auth. Law § 1266-c14(a)(i) (McKinney 1986).

[14] The North Carolina law declares that it is state policy to "encourage and promote use of small, minority, physically handicapped and women contractors" in construction of state roads. N.C.Gen.Stat. § 143-135.5 contains a similar provision for the construction of public buildings.

[15] In addition to the set-aside program, Ohio law establishes both a minority business development commission (Ohio Rev.Stat.Ann. §§ 122.92 - 122.94) and a minority development financing commission (Ohio Rev.Stat. Ann. §§ 122.71-122.85). There is also a special bonding program for minority contractors (Ohio Rev.Stat.Ann. §§ 122.87 - 122.89).

[16] The Oklahoma statute requires the State Purchasing Director to certify annually the percent of funds expended on state contracts which have been awarded to minority business enterprises. If the percentage is less than 10%, then a 5% bid preference goes into effect. The percentage is adjusted annually according to formula. Okla. Stat. Ann. tit. 74, § 85.45c(B).

[17] The Oregon Minority and Women Business Assistance Act defines disadvantaged, minority, and women business enterprises, establishes a certification procedure, prohibits fraud, establishes an advocate to "assist in the development and implementation of an aggressive strategy . . . that encourages participation of minorities and women in the state's economy," and sets standards for good faith efforts to meet goals. Or.Rev.Stat. §§ 200.005 - 200.085.

State	Citation	Coverage	Goals
Pennsylvania	73 Pa. Stat. Ann. §§ 390.1 - 390.18 (1987)	[18]	
	Exec. Order No. 1987-18 (1987)	State agency purchases	
Rhode Island	R.I. Gen. Laws §§ 37-14.1-1 to 37-14.1-8	Any and all goods and services	10%
	Exec. Order No. 85-4 (Feb. 20, 1985)	State purchases	10% minimum
South Carolina	S.C. Code Ann. §§ 11-35-5010 to 11-35-5270 (Law. Coop. 1986)	Total procurement	[19]
Tennessee	Tenn. Code Ann. § 4-3-728	Community development block grants	[20]
Texas	Tex. Civ. Code Ann. art. 4413 (301)	State procurement	[21]

[18] The Pennsylvania Minority Business Development Authority Act creates an authority and a bureau as part of the Department of Commerce and establishes a development fund. The Authority can lend money and guarantee investments in MBEs. The Executive Order creates an Office of Minority and Women Business Enterprise to "aggressively pursue contracting and subcontracting opportunities for MBEs . . . with State Government." Each agency is to "establish specific goals for meaningful and significant participation of MBEs . . . ." The Order also requires all departments, boards, and commissions to appoint a minority business coordinator to cooperate with the Office of Minority and Women Business Enterprise in developing an effective program in each agency "in establishing specific goals . . . ." *Id.* at 4 and 5(d).

[19] The law, which applies to all procurement, states that each agency director must set up an MBE plan annually with a goal that a "reasonable percentage" of the agency's "total procurements" will be purchased from minority businesses. S.C.Code Ann. § 11-35-5240(1). The South Carolina law also sets up a Small and Minority Business Assistance Office that provides lists of minority contractors, training of minority contractors, other training programs, and special publications. S.C. Code Ann. § 11-35-5270. The S.C. Department of Highways & Public Transportation is required by its enabling legislation to expend 5% of its construction funds with "small business concerns owned and controlled by economically and socially disadvantaged individuals." S.C.Code Ann. § 12-27-1320 (Law.Coop.Supp. 1987).

[20] Tenn.Code Ann. §§ 4-26-101 - 4-26-105 (Michie 1985) defines "disadvantaged business" enterprises; the statute authorizes the Department of Economic and Community Development to assist disadvantaged businesses by offering aid and developing loan sources. That statute contains no specific goals. Tenn.Code Ann. § 4-3-728, however, states that a "substantial portion" of community development block grants must be used, when "reasonably possible," for contracts with disadvantaged businesses.

[21] Several provisions of Texas law concern MBEs. Tex.Civ.Code Ann. art. 4413 (301), §§ 5.001 - 5.007 sets up a program to assist small businesses, including "disadvantaged" businesses. The Office of Small Business Assistance must offer guidance, assist with bidding, and foster participation by those businesses in state procurement. State agencies must keep data on the number of contracts awarded to disadvantaged businesses. Tex.Civ. Code Ann. art. 1118y, § 20 (d)(1) (Vernon 1988) authorizes regional transportation authorities to adopt MBE programs; Tex. C.P. & R. Code Ann. § 106.001 defines an MBE and authorizes municipalities to establish MBE programs.

State	Citation	Coverage	Goals
Virginia	Va. Code § 11-48 (Michie 1985)	[22]	
	Governor's Memorandum re: Minority Business Procurement Goals (1/15/83)	Contractual services, supplies, materials, and capital outlay projects	1.3%
	Governor's Memorandum re: 1984-85 goals (10/12/84)	State purchases as above	3-5%
Washington	Wash. Rev. Code Ann. §§ 39.19.010 to 39.19.921 (West 1988)	Goods and services	[23]
Wisconsin [24]	Wis. Stat. Ann. § 16.855 (10m) (a) (West 1987)	Construction contracts	5%
	Wis. Stat. Ann. § 16.75 (3m) (a); § 16.87(2) (1985-86);		

[22] The statute is intended to foster small businesses and those owned by minorities and women. "All public bodies shall establish programs" to facilitate the participation of minority businesses in state procurement transactions.

[23] The Washington Code establishes an Office of Minority and Women's Business Enterprises. The Office must establish overall goals for each state agency and educational institution for the procurement of goods and services, including professional services, from minority and women owned businesses. The programs are to be administered on a contract-by-contract basis or in a class-of-contract basis. Washington law also requires "first class cities" (those over 20,000) to "invite at least one proposal from a minority or woman contractor" when letting bids on "small public works." Wash. Rev. Code Ann. § 35.22.650. All contracts exceeding $10,000 let by first class cities must contain a clause that requires the contractor to "actively solicit" employment of minority group members and to solicit bids from minority group subcontractors. Wash. Rev. Code Ann. § 35.22.620(7)(b).

[24] A number of Wisconsin statutes contain specific goals for minority business enterprises: Wis.Stat.Ann. § 84.075—a 5% set-aside provision for engineering services and highway construction and maintenance contracts; Wis.Stat.Ann. § 16.87 (2)—5% set-aside for engineering, architectural, and environmental consultant services; WIS.Stat.Ann. § 16.75 (3) (3m) & (b)—5% set-aside for purchase of materials, supplies, equipment, and contractual services by the legislative and judicial branch. Wisconsin municipalities with sewer construction projects funded under the combined sewer overflow abatement program must set goals of awarding 20% of the subcontracts to MBEs. Wis.Stat.Ann § 66.905.

APPENDIX II

Minority Business Enterprise Programs of Municipal and County Governments [1]

The city and county programs listed on this chart include a wide variety of initiatives, including contracting goals, subcontracting goals or requirements, good faith efforts, bid preferences, set-asides, workforce requirements, and outreach programs, among others. A numerical percentage in the "Goals" column should not be read to imply a fixed and nonwaivable requirement or the absence of a waiver provision.

State and City/County	Citation	Types of Contracts Covered	Goals
Alabama:			
Birmingham:	Birm. Code § 3-3-16	Construction and purchase of goods, material, equipment, and services	Encourage, facilitate, and effect greater minority participation [2]
Alaska:			
Anchorage	Mun. Code § 7.60.010 *et seq.*; Mun. Reg. 7.60.006	All	Mayor sets annual goals on recommendation of MBE coordinator
Juneau	Ord. Serial No. 80-26; Res. Serial No. 677;	Construction Services	12-15% 2%

	City & Borough Code § 53.50.95 and program guidelines	Goods Other	2% 5%
North Slope Borough	Mun. Code § 2.36.130	All	5% bid preference
Soldotna	Female and Minority Enterprise Program (Sept. 1980, rev. Jan. 1984)	FAA assisted projects	5%

[1] This list is intended to be illustrative only and should not be regarded as exhaustive. The information in this appendix was collected from a survey drafted by the State and Local Legal Center and circulated through three channels to more than 3,600 state and local government officials. The Legal Center mailed the survey to more than 200 minority business development coordinators and contract compliance officers from mailing lists obtained from the Minority Business Enterprise Legal Defense and Education Fund, Inc., which has published another compilation in its Report on Minority Business Enterprise Programs of State and Local Governments (Jan. 1988). The National Association of Counties mailed the survey to 350 elected county executives, 780 professional county managers, and 300 appointed county civil attorneys. The National Institute of Municipal Law Officers mailed the survey to 2000 city attorneys. More than 700 responses were received. All information contained in this appendix is on file at the State and Local Legal Center.

[2] This plan was adopted after a goal of 10% participation by minorities in city contracts was invalidated. *Arrington v. Associated General Contractors,* 403 So.2d 893 (Ala. 1981), cert. denied, 455 U.S. 913 (1982).

State and City/County	Citation	Types of Contracts Covered	Goals
Arizona:			
Maricopa County	Program scheduled for adoption May 1988	Overall goal	10%
Mesa	Res. No. 4556 (1980)	CDBG funds	12%
Phoenix	Res. No. 15629	City-wide MBE utilization plan	Same percentage city-wide as applicable to federal grant-in-aid programs
Tucson	Res. No. 13567	All	Dollar value set on case-by-case review
California:			
Anaheim	Res. No. 85R-311	All	11.9%
Bell Gardens	Res. No. 84-11	Federally funded construction projects	10% goal and failure to meet goal can be grounds for rejecting

			the low bid on a particular project
Culver City	Res. No. 86-RO48	UMTA funds	10%
Fresno	Res. No. 87-344	Construction	25%
Gardena	Minute resolution (2/17/84)	UMTA funded projects	13.1%
Hayward	Ord. No. 86-09 C.S.	Procurement contracts over $10,000	10% bid preference for MBE
		Public works contracts exceeding $100,000	Percentage goal set annually
Los Angeles	Exec. Directive No. 1-B (March 29, 1983)	All, with some dollar minima	12-20% set by Dept.
Oakland	Ord. 9739CMS (March 13, 1979)	Purchasing	30% goal and 10% preference
	Res. 60691 (June 15, 1982)	Construction	30%
	Res. 58715CMS (Feb. 19, 1980)	Professional services	40%
Pasadena	Res. No. 83-2 (1983)	Community development funds	20%

State and City/County	Citation	Types of Contracts Covered	Goals
(Pasadena cont.)	Res. No. 54-82 (1980)	All contracts	10%
Richmond	Res. No. 183-84	Construction employment	population parity
		Construction contracting	20%
		Permanent project employment	good faith effort to achieve 125% of SMSA as of 1980 census (but not less than 35%)
		Business developed by the City	20%
		Goods, services, and franchises	20%
Sacramento	Res. No. 85-328	Procurement	20% (combined MBE and WBE)

Santa Clara County	Bd. of Supervisors Policy, Dec. 11, 1984	Construction Services contracts of $12,000 or more	12% contract-by-contract
San Diego	Res. Nos. R-262633: R-270402	Construction Consultant Vendor	20% 12% 10%
San Francisco	Ord. No. 139-84, S.F. Admin. Code ch. 12D [3]	Overall goal All contracts All purchases	30% 5% bid preference 10% set-aside
San Jose	Res. No. 56342 (1983); Res. No. 59890 (1987); Res. No. 58915 (1986)	Construction contracts over $50,000	Set for each project
Santa Monica	Res. No. 6386 (1981)	Public works and all purchasing	10% goal (22% achieved)
Solano County	Ord. No. 1310 (1987)	All for-profit contracts	13%

[3] This plan was largely invalidated in *Associated General Contractors of California v. City & County of San Francisco*, 813 F.2d 922 (9th Cir. 1987), pet. for rehearing pending.

State and City/County	Citation	Types of Contracts Covered	Goals
Stockton	Res. No. 87-0584	All public works, supply, and services contracts over $20,000	15%
Colorado:			
Denver	Ord. No. 246 (1983)	Construction, professional services, and design	20%
Greeley	Ord. No. 420	Federally funded projects	Annual goals
Connecticut:			
Hartford	Resolutions of June 10, 1985, and Feb. 14, 1983	Construction	At least 10% MBE and WBE with determination to be made for particular contracts whether a greater percentage for MBEs is possible

New Haven	Ord. No. 12½ (1965)	Construction projects over $100,000	15%
Delaware:			
New Castle County	Exec. Order No. 12 (1985)	All contracts	15%
Wilmington	1 Wilm. Code §§ 20-40 through 20-43	Construction All contracts	15% set-aside 25% goal in FY 1990
District of Columbia	D.C. Code §§ 1-1141 to 1-1150	All contracts	35% unless otherwise set
Florida:			
Alachua County	Ord. No. 86-8	All bid contracts	15% (subject to reevaluation)
		Specific contracts	Percentage can be set aside
Broward County	Ord. No. 84-14; Admin. Order No. 852; Res. Nos. 84-1688 and 87-3570	All procurement except medical and legal services, and construction contracts over $150,000	Annual goals proportioned to population

State and City/County	Citation	Types of Contracts Covered	Goals
(Broward Cty. cont.)		Particular contracts	Percentage can be set aside to remedy past acts of discrim-ination
Daytona Beach	Ord. No. 84-131, City Code ch. 13½, art. II	Subcontracts	10%
Dade County	Cty. Code § 10-38	Construction	Contract specific
	Cty. Code § 2-8.2	Goods and services	Contract specific
Escambia County	County Commission Policy Statement, March 4, 1983	Contracts for goods and services in the construction industry:	
		$1 million or less	10%
		$1 to 10 million	5%
		over $10 million	1%

Fort Lauderdale	Code § 2-40.1	Procurement	Equitable opportunity to participate
Fort Myers	Ord. No. 2333 (1986)	All contracts and subcontracts	12%
Gainesville	Res. No. 86-60	All	Must take affirmative action to solicit quotations from MBEs; all factors being equal, preference shall be given MBEs
Hialeah	City Code § 2-5 (1984)	Contracts over $50,000	25% of contractor's workforce must be minority
Hillsborough County	Res. No. R 86-0170	Construction contracts of $100,000 or more	25%
		Goods and services	5%

State and City/County	Citation	Types of Contracts Covered	Goals
Jacksonville	Ord. No. 83-1200-647	All	10%
Leon County	Bd. of Commissioners Policy, Sept. 29, 1987	Capital improvement budget (except construction), equipment, commodities, and services	5%
Miami	Ord. No. 10062, City Code § 18-67	Procurement	51%
Orange County	Cty. Code art. IV, ch. 1, § 1-63 to 1-69	All contracts and subcontracts	18%
Orlando	City Code, ch. 57, art. II	Construction, services, and supplies	18%
Palm Beach County	Ord. No. 88-4	All	Encourage participation by MBEs and use good faith efforts to achieve

			the maximum use of MBEs [4]
Pensacola	Ord. pending passage to create § 3-3-4 of Pens. Code (formerly by executive policy)	All	15%
St. Petersburg	City Code ch. 2, art. III, § 2-57	Goods and services	10%
	City Code ch. 2, art. III, § 2-59	Construction	Contract by contract
Tallahassee	Res. No. 82-R-1216	Contracts over $100,000	15%
Tampa	Exec. Orders No. 85-19 and 86-14	All contracts	25%
Georgia:			
Atlanta	Admin. Order No. 84-5	Contracts over $25,000 and contracts for professional or consulting services	Set annually (35% for 1985)

[4] A draft ordinance including overall goals for MBE participation in county contracting was redrafted following the Fourth Circuit's decision in the *Croson* case. Memorandum of March 31, 1988, to the State and Local Legal Center from Maureen Cullen, Assistant County Attorney, Palm Beach County, Florida.

State and City/County	Citation	Types of Contracts Covered	Goals
Augusta	Res. No. 9842 (1984)	Transit Dept. contracts	10%
Dekalb County	Res. of Aug. 15, 1982	All	15%
Fulton County	Res. of July 17, 1987	Contracts over $25,000 and contracts for professional or consulting services	Goal of 20% for FY 88; set annually
Macon	Res. No. R-83-0008	Inner city development project	Start-up costs for MBEs
Richmond County	Bd. of Commissioners Policy Statement, 12-1-87	Contracts over $25,000 and contracts for professional or consulting services	Foster and promote MBEs; actively solicit bids

Hawaii:			
Maui	Res. No. 82-3	Federally assisted projects.	10%
Illinois:			
Bloomington	City Code ch. 22.2	Construction	8.9% (by population)
Evanston	Res. No. 59-R-73	All goods and services	Must solicit bids from MBEs
		Specific projects and commodities	Percentage set aside annually by city manager
Peoria	City Counsel Policy and City Affirmative Action Plan 1985-88	Subcontracts	10%
Peoria County	County Affirmative Action Policy, August 14, 1984	All	County will not contract with any business that does not have an affirmative action plan; contractor must supply information on

State and City/County	Citation	Types of Contracts Covered	Goals
(Peoria Cty. cont.)			racial composition of workforce during bidding
Rockford	Mayor's Program on Minority Businesses (1985)	All	Recruits and refers MBEs
	Equal Employment Opportunity Ord. No. 9½	All contractors with the City	Must maintain a minimum 9% minority workforce
Indiana:			
Anderson	Resolutions 1981 and 1985	Construction and other purchases	10%
Fort Wayne	Gen. Ord. No. G-84-07 (1984)	Procurement Construction	15% 10%
Indianapolis/ Marion County	Exec. Order No. 1 (1987)	All	10%
Iowa:			

Cedar Rapids	Res. Nos. 532-4-84; 1373-9-85; 76-1-86	All Federally funded projects	5% 10%
Des Moines	Contract Compliance Program and Policy Statement (1986)	Public works contracts Professional services	7-9% 4%
Iowa City	Res. No. 83-417	All Contracts over $25,000	3% Contractor must have affirmative action program
Mason City	Human Rights Code, tit. II	All Federally funded projects	2% 10%
Waterloo	Res. No. 1986-58	Construction projects over $100,000 Construction funded all or in part by federal funds	5% 10%
Kansas:			
Lawrence	Ord. No. 5436 (1983)	All contracts over $10,000	12.9%
Leavenworth	Res. No. B813 (1984)	Construction	10%
Wichita	Admin. Reg. 64 (1983)	CDBG funded construction	10%

State and City/County	Citation	Types of Contracts Covered	Goals
Kentucky:			
Jefferson	Res. No. 75, Series 1987	Construction subcontracts	15%
Lexington/ Fayette County	Code § 2.46	All	Policy to encourage use of MBEs
Louisville	Ord. No. 136 (1983)	All	5% credit on MBE bids if 20% of prior year's expenditures are not awarded to MBEs [5]
	Proposed Ord.	All	MBE Utilization Plan
Louisiana:			
Baton Rouge	City Ord. No. 10390; Parish Ord. No. 16793 (1980)	Construction contracts over $100,000, professional services, equipment, and supplies	10%
Calcasieu Parish	Motion of Police Jury Jan. 21, 1988	Jail and Courthouse Improvement Project	10%
Lake Charles	Ord. No. 6747 (1980)	All	10%

Monroe	Ord. Nos. 7932 (1986); 7322 (1981)	All DOT assisted programs	10%
New Orleans	City Ord. No. 2-50.5; Exec. Order 84-01; Admin. Dir. 210	Construction and public works contracts over $100,000	20% goal and 1% set aside
Shreveport	Exec. Order No. 88-1	Construction and purchases	10%
		Professional services	5%
Maryland:			
Anne Arundel County	MBE Procurement Guidelines and Procedures, Nov. 1985	All contractors on contracts over $10,000	Must take affirmative steps to use MBEs, including soliciting bids and either confirming use of MBE subcontractors or showing good faith efforts; noncompliance with MBE policy can be grounds for denial of contract and actions against contractor

[5] This plan was invalidated in *J. Edinger & Son, Inc. v. City of Louisville, KY*, 802 F.2d 213 (6th Cir. 1986).

State and City/County	Citation	Types of Contracts Covered	Goals
Baltimore	Ord. No. 790 (1986)	All	20%
Baltimore County	Exec. Order (1983)	Capital improvement projects over $100,000	10%
Howard County	Cty. Code tit. 4, subt. 1, § 4.103(d)	All	10% if solely city funded, 15% if federally funded
Montgomery County	Cty. Code § 11B-23A	All contracts over $75,000	15%
Prince George's County	Ch. 102, 1984 County Laws; chs. 87 & 88, 1987 County Law; CR-33-1985; CR-107-1987	All	30%
Massachusetts:			
Amherst	Selectmens Policy G-2-11-86	All	5%
Arlington	Town Plan (1984)	Construction, supplies, materials, services, and equipment	5%

Attleboro	MBE Plan/Statement of Policy, Dec. 1981	Construction contracts over $50,000, other contracts over $4,000	5%
Boston	Exec. Order, Dec. 1, 1987	Goods and services	15%
		Construction	15%
		Construction in an impacted area	30%
Fitchburg	Policy Statement (1986)	All contracts and purchases	10%
Lynn	Policy Statement (1985)	Construction contracts over $150,000, goods, services, and supplies	10%
Malden	Ord. No. 754 (1985)	Goods, services, and supplies	10%
Marlborough	MBE Policy Statement (1982)	Purchases over $25,000	5%
New Bedford	Exec. Order No. 3 (1986)	Construction, materials, goods, and services	10%
			5%
Springfield	Exec. Order (1984)	All	10% MBE and WBE combined

State and City/County	Citation	Types of Contracts Covered	Goals
Michigan:			
Battle Creek	Res. No. 114 (1980)	All contracts over $10,000 and all contractors with more than 15 employees	Failure to comply with affirmative action package precludes award of contract and can be basis for sanctions
		Construction	Contractors must employ minimum SMSA minorities
Detroit	City Code 18-5-31 *et seq.*	All city contracts	20%
Flint	Res. No. R-19 (Feb. 11, 1985)	Construction contracts over $10,000	20-46% phased in by 1990
Grand Rapids	City Commission Policy, May 25, 1982 (Code 1600-05)	Construction contracts over $10,000	10%
		Other contracts	Use of MBEs is encouraged
Saginaw	City Ord. D-1516 (1986)	Construction contracts	
		$50,000-$100,000	9%
		$100,000-$250,000	12%
		over $250,000	15%

		Procurement	up to 20% set aside for MBE/WBE
Minnesota:			
Hennepin County	Res. No. 7221	All above $50,000	
		Construction	6-10%
		Services	10%
		Goods	10%
		Construction subcontracting	10%
Minneapolis	Ord. No. 139.50; Res. of Dec. 20, 1980	Purchases and construction	10%
		Development	15%
St. Paul	Admin. Code ch. 81	All	5-15%
Twin Cities Metropolitan Waste Control Commission	Res. No. 87-262	Construction and engineering	Percentage set on each contract
		Goods and Services	Goals of 3½ to 10%
Mississippi:			
Jackson	Order 3-Z-323 (1985)	All	15%

State and City/County	Citation	Types of Contracts Covered	Goals
Missouri:			
Independence	City Affirmative Action Plan (rev. 1988)	All contracts over $10,000	2.5%
Kansas City	Admin. Reg. of City Manager (Sept. 5, 1980)	Construction Supplies Services	16% 10% 15%
St. Charles	Admin. Policy Jan. 1987	All	Good faith effort
St. Louis	Exec. Order Dec. 6, 1984	Construction contracts over $100,000	25-30% city residents in contractor's workforce, of whom 50% must be minorities
Nebraska:			
Lincoln	Ad. Reg. No. 12 (1984)	All contracts	Good faith efforts
Omaha	City Code ch. 10, § 10-108 § 10-194	Central Park Mall All	10% Must solicit

	§ 10-200	All	bids from minority sub-contractors 5% of contracts and 5% of dollar value of contracts
Nevada:			
Nye County	Res. No. R8 5-2A	All contracts over $10,000	5%
New Jersey:			
Atlantic City	Ord. No. 14 (1979); Exec. Orders No. 1 (1985) and No. 2 (1984)	All	25%
Atlantic County	County Exec. Order, May 19, 1983	Construction contracts over $100,000	15%
Atlantic County Improvement Authority	P.L. 1975, ch. 127	All	15% combined MBE and WBE

State and City/County	Citation	Types of Contracts Covered	Goals
Camden	Ord. MC 1964 (June 1983)	Construction, goods, and services	25% to 50% subcontracting (depending on size of contract)
	Ord. MC 2274 (Feb. 1987)	Construction, services, and procurement	15% set aside
East Orange	Ord. No. 7 (1982)	Construction and capital goods	25%
Newark	Ord. No. 6S & FE	Construction	33 1/3%
		Goods and services	25%
New Brunswick	Rev. Ord. No. 2-6v (Aug. 1986)	All procurement, all major construction projects and other enterprises	Percentage negotiated on contract-by-contract basis
Plainfield	Mun. Code art. 18, § 11-18-1	Construction subcontracting	25%
Union County	Res. No. 676-87	All purchases unless county has no discretion as to payee	7%

New Mexico:			
Albuquerque	Bill No. R-19, Enactment No. 27-1986	All public money expended by City for purchase of goods and services	10%
		US DOT funds	15%
New York:			
Albany	City Code § 1-706 to 1-718	All	17.8%
Albany County	Res. No. 124 (1985)	All contracts over $100,000	10%
Binghamton	Ord. No. 83-31	All	10%
Broome County	Res. No. 260 (1983); Res. No. 139 (1985)	Construction contracts over $100,000	3.5%
Buffalo	Common Council Proceedings 169 May 1, 1979	CDBG funded construction and demolition contracts	10%
Erie County	Local Law No. 6-1987	All contracts of County Dept. of Public Works and Dept. of Planning	10%

State and City/County	Citation	Types of Contracts Covered	Goals
(Erie Cty. cont.)		and Engineering over $100,000	
Monroe County	Exec. Order No. 1 (1983)	Construction	10%
New York	N.Y.C. Admin. Code tit. 6, § 6-108.1; § 6-108.2	Construction contracts in economic developments areas	10% for locally based enterprises including MBEs
Rochester	Res. No. 80-83 (1980 and annually thereafter)	Construction	Percentage set annually by City Council
Syracuse	City Charter, ch. 42	Construction contracts: $20,000 to 100,000 over $100,000	10% 15%
North Carolina:			
Chapel Hill	Disadvantaged Business Enterprise Program, September 1984	US DOT contracts	Each contract to have goals; failure to meet goals or show good faith effort can result in determination

			that bid is not responsive
Charlotte	N.C. SB 290, ch. 344 (1987); City Plan, Nov. 23, 1987	Construction	10%
		Procurements and professional expenditures	3%
		Federally assisted airport construction	14%
		US DOT UMTA funds	13%
Durham	Res. No. 5797 Res. Book 6, p. 41	Services, materials, and construction	20-35%
Greensboro	Code ch. 2, art. IV, § 2-117 (1985)	Commodities, services, construction, and repair work	10%
Mecklenburg County	Bd. of County Commissioners, Minority and Women's Business Enterprise Program (1986-87)	Construction and consulting	10%
		Procurement and professional services	3%
Winston-Salem	Res. Adopting Minority and Women Business Enterprise Program (July 18, 1983)	Construction	Goals negotiated for each contract; 5% penalty if contractor fails to meet

State and City/County	Citation	Types of Contracts Covered	Goals
Ohio:			
Akron	City Code § 34.10	Construction	15%
		Equipment, supplies, materials, nonprofessional services	7%
		Professional services	5%
Cincinnati	Ord. No. 242-1987	Construction	20%
		Equipment, supplies, materials, nonprofessional services	7%
		Professional services	5%
Cleveland	City Codified Ord. ch. 187	Construction	30%
		Services	20%
		Professional services	30%
		Supplies	20%
		Concessions	15%
Columbus	City Code §§ 3901-3927	Construction, services, purchase or lease of personal property	10%

Cuyahoga County	Res. No. 737333 (1987)	Construction contracts over $10,000	25%
		Supplies, goods, and services over $10,000	15%
		Contracts between $1,000 and $10,000	Percentage may be set aside
Dayton	R.C.G.O. §§ 35.30-35.35	Construction	20%
		Goods and services	5%
	R.C.G.O. -- 35.40-35.47	Sheltered market:	
		Construction	15%
		Goods and services	2.5%
Elyria	Ord. No. 83-758	Construction	14%
		Supplies, services, and professional contracts	5%
Lima	Ord. No. 131-86; Exec. Order (12/20/82, revised 4/7/83)	CDBG funded contracts	16%
Lorain	Ord. No. 23-82	Construction	15%
		Supplies	5%
Lorain County	Res. No. 84-547	Contracts over $20,000 for construction, supplies, and services	15%

State and City/County	Citation	Types of Contracts Covered	Goals
Massilon	Ord. No. 84-1983	All	10%
Montgomery County	Res. No. 87-1509	All procurement and additional programs:	15%
		Construction	Preference to contractor who meets subcontracting goal
		Professional services	Bid credits
		Goods under $10,000	Sheltered markets
Springfield	Ord. No. 84-608	Construction	10%
		Goods and services	5%
		Others	Conscientious effort
Stark County	Bd. of County Commissioners Res. of March 18, 1986	Construction contracts over $10,000	Waivable 10% set aside and 10% goal
Youngstown	Ord. No. 80-744; 84-465	All	Short-term 10% Long-term 15%

Oklahoma:			
Tulsa	Res. of 4/18/86	All	Each City Dept. to set feasible goals
Pennsylvania:			
Harrisburg	Ord. No. 7-1983	Construction	15%
		Equipment purchases	5%
		Material, supplies	10%
		Services	15%
		Professional services	15%
Philadelphia	Phila. Code, ch. 17-500	Construction, vending, and services	15%
South Carolina:			
Charleston	City Code § 2-267		Set annually, but not less than
		Construction	8%
		Services	3%
		Supplies	5%
Columbia	Res. No. R-86-10 (1986)	All	Specific procurement goals set annually; specific contract goals set

State and City/County	Citation	Types of Contracts Covered	Goals
(Columbia cont.)			on each prime contract of $25,000 or more
Richland County	Ord. No. 1068-83HR	All over $5,000	15%
South Dakota:			
Sioux Falls	Res. No. 158-86	City street projects	5%
	Res. No. 36-88	Construction	10%
	Res. No. 271-85	Procurement	Equitable opportunity to compete
Tennessee:			
Chattanooga	Res. No. 13618	Contracts over $500,000	10-13%
Memphis	Ord. introduced 3/17/87	All goods and services	10%
		Construction contracts over $100,000	10%
Shelby County	Res. No. 18 (1986)	All	10%
Texas:			
Austin	Ord. No. 87-0219-Q	Construction contracts	5%

		Construction subcontracts	10%
		Goods and nonprofessional services	10%
		Professional services	5%
Beaumont	Res. No. R-86-164	Construction over $50,000	10%
		Professional services over $25,000	20%
Dallas	Res. No. 84-5301	Over $25,000	17%
		$10,000 to $25,000	2%
		Under $10,000	7%
El Paso	Ord. of Aug. 13, 1985	Construction	25%
		Professional services, equipment, supplies, services	20%
Fort Worth	City Council Policy, July 8, 1986	All	12%
Houston	Ord. No. 84-1309	Construction over $1 million	12%
		Goods over $100,000	9%
		Services	19%

State and City/County	Citation	Types of Contracts Covered	Goals
Lubbock	City Council Minority/Women Business Enterprise Statement, March 1984; Res. No. 667 (Dec. 11, 1980)	All contracts and projects	Good faith effort
San Antonio	Ord. No. 51954 (1980)	Procurement Construction Professional services	5-9% 12-15% 32-35%
Virginia:			
Richmond	Mun. Code § 12-156(a)[6] Mun. Code § 12-156(b)	Construction All other contracts	30% 20%
Washington:			
King County	Cty. Code ch. 4.18 of 1982, amended by Ord. Nos. 7789, 8121, 8313	Construction Services Goods Concessions Consultant	18% 10% 15% 10% 15%

Renton	R.C.W. § 35-35.22.650	Construction	Set by contract
Seattle	Ord. No. 109113, codified at Mun. Code ch. 20-46	Construction and consulting	20%
		Purchasing	15%
Spokane	City Council Res. 1988	All contracts	5%
Tacoma	Official Code ch. 10.26	Construction	15%
Wisconsin:			
Madison	Res. No. 39,920	Consulting, construction, vendor	Overall goal 10% and specific projects 5%
Milwaukee	Mun. Ord., ch. 360	All projects	28% phased in over 7 years (enacted 1987)
Milwaukee County	Ord. chs. 32, 42, 44	All procurement, professional services, construction	15%

[6] This plan is under review in this case.

State and City/County	Citation	Types of Contracts Covered	Goals
Milwaukee Sewerage District	Exec. Orders No. 12138, 11625, 12432; NR 128.14	Construction	10% 1980-82 and 15% thereafter
		Professional services	10% until 1984 and 15% thereafter
Racine County	Ord. under consideration [7]		

[7] Memorandum of March 28, 1988, from Joseph R. Buchanan, Racine County Affirmative Action Officer.

No. 87-998

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J. A. CROSON COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC. ("MBELDEF") AND THE LOUISIANA ASSOCIATION OF MINORITY AND WOMEN OWNED BUSINESSES, INC. ("LAMWOB") AS AMICI CURIAE IN SUPPORT OF APPELLANT

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No. 87-998

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

City of Richmond,

Appellant,

v.

J. A. Croson Company,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC. AND THE LOUISIANA ASSOCIATION OF MINORITY AND WOMEN OWNED BUSINESSES, INC. AS AMICI CURIAE IN SUPPORT OF APPELLANT[1]

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[1] Amici MBELDEF and LAMWOB file this brief pursuant to the letters of consent lodged with the Clerk of the Court.

INTEREST OF AMICI CURIAE

Amicus Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF"), a non-profit corporation, was founded in 1980 by former Maryland Congressman Parren J. Mitchell. The primary purpose of MBELDEF is to promote minority business opportunity programs. MBELDEF is comprised of over 800 minority businesses nationwide, many of which, in their efforts to become successful commercial enterprises, have benefited from federal, state, and local minority business opportunity programs. MBELDEF has provided numerous state and local governments with legal guidance in the adoption of such programs and has participated in

significant litigation concerning these programs.[2]

Amicus Louisiana Association of Minority and Women Owned Businesses, Inc. ("LAMWOB") is a not-for-profit corporation organized in 1988 to promote minority business opportunity programs within the State of Louisiana. LAMWOB's membership consists of, but is not limited to, contractors that have been certified to participate in a federal program for socially and economically disadvantaged businesses and therefore derive their livelihood, at least in part, from minor-

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[2] Most recently, MBELDEF has appeared as intervenor-appellee before the United States Court of Appeals for the Sixth Circuit in Tennessee Asphalt Co. v. Farris, No. 87-5588 (6th Cir. argued Mar. 31, 1988) and as amicus curiae before the United States Court of Appeals for the Ninth Circuit in Associated General Contractors of California v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987) (petition for rehearing en banc pending).

ity business opportunity programs. LAMWOB has supported minority business participation programs in New Orleans.

Amici MBELDEF and LAMWOB therefore have a significant interest in this Court's determination concerning the constitutionality of the Richmond Minority Business Utilization ("MBU") Plan.[3]

SUMMARY OF ARGUMENT

The remedial concept of minority business opportunity programs was born of the compelling interest of government to purge the final vestiges of

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[3] There are currently in excess of 160 state and local government minority business opportunity plans in effect nationwide that might be affected by the outcome of this case. See Minority Business Enterprise Legal Defense and Education Fund, Minority Business Enterprises: Programs of State and Local Governments, Academy for State and Local Government 2 (Jan. 1988) [hereinafter MBELDEF Report] (lodged with the Clerk of the Court and sent to the parties).

identified racial discrimination. Federal, state, and local minority business opportunity programs are aimed at meeting that goal by taking affirmative steps to create a level playing field in the realm of public procurement. The Richmond MBU Plan represents just such an effort by a responsible municipality to address pervasive discrimination within its public sector marketplace.

The district court found that the evidence before the Richmond City Council was sufficient to establish a compelling interest in remedying discrimination in public sector construction contracting. It also found that the MBU Plan was an appropriate means of addressing that interest. Finally, it found that plaintiff had failed to demonstrate that the plan would place an excessive burden on non-minority contractors in

contravention of their constitutional equal protection rights.

The Fourth Circuit committed legal error in reversing this well-reasoned district court opinion. First, it misinterpreted Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) to require that the Richmond City Council should have found past discrimination by Richmond against minority contractors in order to establish the City's compelling interest in remedying such discrimination. Wygant imposes no such condition. Rather, it requires only that Richmond had convincing evidence to support its conclusion that there was prior discrimination. The Fourth Circuit also failed to grant due deference to the district court's findings of facts and erroneously ascribed the burden of proof to Richmond notwithstanding plaintiff's failure to

introduce any evidence to rebut Richmond's showing of past discrimination.

Second, the Fourth Circuit erroneously concluded that the MBU Plan was not tailored narrowly enough to avoid violating the equal protection rights of non-minority contractors. In reaching this conclusion, the Fourth Circuit incorrectly applied scrutiny crafted for judicial review of layoff plans, with their direct and substantial harm to non-minority individuals, rather than the test this Court has adopted for review of minority business opportunity programs. In fact, as the district court properly concluded, the MBU Plan is narrowly tailored to the remedial goal of addressing discrimination in construction contracting. The limited burdens imposed on non-minority contractors are not violative of

the Fourteenth Amendment to the Constitution.

ARGUMENT

I.

THE COURT OF APPEALS DISREGARDED THE SIGNIFICANT AND COMPELLING GOVERNMENTAL PURPOSES SERVED BY MINORITY BUSINESS OPPORTUNITY PROGRAMS SUCH AS THE MBU PLAN

A. Readily Identifiable Private and Public Discrimination Has Impaired Minority Businesses' Access To Public Contracting Opportunities

It is uncontroverted that the combined effects of past and present, private and public discrimination have denied public contracting opportunities to minority-owned businesses. Although the discrimination at issue here may, at first glance, appear to be less direct than the more renowned Jim Crow segregation of public facilities -- it is not. The barriers to access resulting from private and public discrimination in the marketplace, and the accompanying fore-

closure of public contracting opportunities for minorities, are as real, and of the same invidious intent, as the notorious "For Whites Only" signs once found in public bathrooms and waiting rooms.

At the national level, empirical tests consistently indicate that discrimination has continued to injure the minority business community.[4] For example, although the nation's population is approximately fifteen percent minority, the most recent economic figures indicate that only five percent of the nation's businesses are minority-owned and that they receive only one-half percent of all contracting gross receipts.[5] Minority entrepreneurs still earn signif-

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[4] See Bates, Minority Business Set-Asides: Theory and Practice, 1 United States Commission On Civil Rights, Selected Affirmative Action Topics in Employment and Business Set-Asides 142, 147 (1985).

[5] See MBELDEF Report, supra note 2, at 2.

icantly less than non-minority entrepreneurs. Bates, supra note 4, at 149-150. Additionally, minority-owned businesses are less profitable, more highly leveraged and are much more likely to be undercapitalized.[6] But for the effects of racial discrimination, a free competitive market would not produce such varying levels of market performance along racial lines.

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[6] In 1944, Gunnar Myrdal observed:

> The Negro businessman, furthermore encounters greater difficulties [than whites] in securing credit. This is particularly due to the marginal position of negro business. It is also partly due to prejudiced opinions among whites concerning the business ability and personal reliability of Negroes. In either case a vicious circle is in operation keeping Negro business down.

Gunnar Myrdal, An American Dilemma 309 (1944).

Discriminatory barriers to minority-owned business participation have been particularly oppressive in the construction industry. Pervasive employment discrimination in the construction trades has prevented minorities from following the traditional path from laborer to entrepreneur.[7] The construction industry is characterized by an "old-boy network" in which white male general contractors work with a closely knit group of white male subcontractors to the exclusion of others.[8] The result of this

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[7] "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." United Steelworkers v. Weber, 443 U.S. 193, 198 n.1 reh'g denied, 444 U.S. 889 (1979). See also Local 28 of Sheet Metal Workers' Int'l Ass'n v. E.E.O.C., 478 U.S. 421 (1986).

[8] United States Commission on Civil Rights, Greater Baltimore Commitment: A Study of Urban Minority Economic Development, 31 (1983) (quoting from G. Douglas Pugh, "Bonding Minority Contractors," in Black Economic Development 138-39 (W.F. Hoddard & G. D.

(Footnote continued)

exclusionary network is that, in the absence of governmental remedy, minority firms are precluded from significant participation in public contracting opportunities. Bates, supra note 4, at

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(Footnote 8 continued from previous page)

> Pugh, eds. 1969)) (Black contractors have been the victims of exclusionary practices of the construction craft unions, which have, in the past, denied them entry into the construction trades. . . . These exclusionary practices have made it almost impossible for black workers to acquire construction skills and to enter the construction business through the normal channel of graduating from skilled worker and foreman into small scale contracting and then, with the accumulation of experience and capital, into larger and more complex work. It has also made it impossible for black contractors to have available to them the quantities of skilled workers needed for larger enterprise. When to this pattern, is added lack of access to financing, the result is an almost total inability of black contractors to qualify for surety bonds needed for participation in most . . . public construction work. . . . Thus, black contractors find themselves in a kind of circular trap where their lack of experience in bonded work makes it virtually impossible to obtain surety bonds for construction work requiring such bonds and thereby gain experience on this type of work, even though they might otherwise have the ability to perform.).

148, 156.[9] Since much of this discrimination is localized, city and state governments have a particularly strong interest in structuring corrective programs.

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[9] The fact that "past impairment of minority-firm access to public contracting opportunities may have been an incidental consequence of 'business as usual' by public contracting agencies" is not sufficient to detract from a government's authority to take remedial action to remedy the impairment. Fullilove v. Klutznick, 448 U.S. 448, 484 (1980). Further, a 1974 Michigan sponsored study, "disclosed unfounded negative attitudes towards minority contractors by those [state] departments charged with the responsibility of awarding an enormous variety of contacts" even though the officials "had not had any actual experience with minority vendors." Michigan Road Builders Ass'n, Inc. v. Milliken, 571 F.Supp. 173, 179 (E.D. Mich. 1983), rev'd, 834 F.2d 583 (6th Cir. 1987). Based on this finding, the study concluded that absent formal state action the "negative attitude of State purchasing authorities toward minority vendors would cripple any steps toward achieving equity in the State's purchasing policies." Id. at 181.

B. Minority Business Opportunity Programs Seek to Remedy Procurement Practices Which Perpetuate the Effects of Discrimination

Minority business opportunity programs are intended to redress discriminatory barriers which have impaired opportunities for minorities in public procurement.[10] These programs are substantially related to the achievement of this goal: first, by attempting to place

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[10] Thirty-two states and 160 local governments have adopted minority business opportunity programs. MBELDEF Report, supra note 2, at 2. These programs can generally be divided into three categories. Some, such as Richmond's, require contractors to attempt to meet a goal for utilization of minority-owned subcontractors. Others establish sheltered markets for minority-owned businesses under certain limited circumstances. See, e.g., South Florida Chapter of the Assoc. Gen. Contractors of Am., Inc. v. Metropolitan Dade County, Fla., 723 F.2d 846, 848-49 (11th Cir.), cert. denied, 469 U.S. 871 (1984). Still others award points or credits for minority participation in determining contract awards, or provide financial and technical assistance. See, e.g., Ohio Rev. Code Ann. §§ 122.71-122.89 (Anderson 1984); Md. State Fin. & Proc. Code Ann. § 18-601 (1988).

minority-owned businesses on a more equitable footing with respect to public contracting opportunities, see, e.g., Fullilove, 448 U.S. at 485-86; and second, by fostering viable minority-owned businesses which, in turn, spur economic growth. Bates, supra note 4, at 142.

Contrary to the notion implicit in the Fourth Circuit's majority opinion, state and local minority business opportunity programs, such as Richmond's MBU Plan, have not been adopted in a lackadaisical fashion and do not reflect "the most casual deployment of race in the dispensation of public benefits." J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1362 (4th Cir. 1987), jur. noted 108 S.Ct. 1010 (1988) (No. 87-998). To the contrary, these programs are modeled after longstanding federal efforts, such as the Section 8(a) program of the Small

Business Act of 1953 ("SBA"), as amended, 15 U.S.C. § 637 (1988);[11] minority business programs developed by federal departments and agencies;[12] and federal legislation such as the Surface Transportation Assistance Act of 1982, Pub. L. 97-424, 96 Stat. 2098, 23 U.S.C. § 104, (1983) ("STAA") and the Public Works Employment Act of 1977, Pub. L. 95-28, 91

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[11] Under the SBA Section 8(a) program, federal contracts are directed to small businesses owned and controlled by "socially or economically disadvantaged" persons in order to assist these persons in achieving a competitive position in the economy. See Fullilove, 448 U.S. at 463-64. See also S. Rep. No. 1070, 95th Cong., 2d Sess. 7 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 3835, 3842.

[12] Although the federal programs differ from agency to agency, they have originated largely from a series of executive orders. See, e.g., Exec. Order No. 11,625, 3 C.F.R. § 616 (1971) (adopted as part of President Nixon's attempt to foster "black capitalism").

Stat. 116, 42 U.S.C. § 6701 ("PWEA").[13]

As demonstrated by the STAA and PWEA, and the large number of state and local programs that they fostered,[14] public construction contracts have been a particular area of emphasis for minority business opportunity programs. The emphasis on construction is appropriate because: (1) a sufficient number of minority-owned firms are available to per-

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[13] Section 105(f) of the STAA required, subject to certain waivers, that at least 10 percent of the funds appropriated under the Act be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by the Small Business Act.

[14] See, e.g., N.J. Stat. Ann. § 52.32-17, (West 1986 & Supp. 1987); Wis. Stat. Ann. §§ 16.75(3)(3m)(a), 16.87(2), 84.075 (West 1957).

form the required government contracts;[15] (2) the large volume and size of public construction contracts yields ample opportunity for minorities to obtain significant subcontracts and prime contracts

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[15] See, e.g., Senate Committee on Small Business, Survey of the Graduates of the Small Business Administration Section 8(a) Minority Business Development Program (1987) [hereinafter Senate Small Business Report] (40 percent of respondents to survey of Section 8(a) graduate companies listed construction and related fields as their primary service at initial certification and 42 percent listed construction and related fields as their primary service after graduation from the program.) See also An Assessment of Program Impacts of the Disadvantaged Business Enterprise (DBE) Requirement in the Federal-Aid Highway Construction Program, (Draft Report, U.S. Department of Transportation, Federal Highway Administration, March 1986) [hereinafter Draft Report to D.O.T.] at 72-73 (43 percent of state transportation officials surveyed indicated that in 1982, prior to enactment of STAA, there were sufficient minority firms in their states to meet the Act's 10 percent goal, and more than 75 percent indicated that availability of minority firms increased after implementation of the STAA) (a copy is attached at tab A to the Compendium of Minority Business Opportunity Plan Reports lodged with the Clerk of the Court and sent to the parties).

without inappropriate burdens on non-minority-owned firms; and (3) minority business development efforts in the construction industry have a great potential for success because non-discriminatory barriers to entry in the subcontracting business are relatively low.[16]

When measured in terms of the number of contracts awarded and jobs created, the benefits to program participants, and the overall growth in the number of minority-owned firms, minority business opportunity programs have proven

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16. The use of subcontracting with its lesser demand on capital and expertise than prime contracting is an appropriate means of effectuating the goal of remedying the effects of discrimination. It is a particularly appropriate means where the objective, as well as the anticipated result, is that successful minority-owned companies will emerge as effective competitors for prime contracts. See also U.S. Commission on Civil Rights, Minorities and Women as Government Contractors 122 (1975).

effective. These programs have aided in the creation and expansion of thousands of minority enterprises in such fields as wholesaling, general construction, business services and large scale manufacturing.[17] The positive effects of these remedial programs have been produced at all levels of government and, more recently, have been duplicated in the private sector.

For example, the SBA Section 8(a) program has been highly successful. A survey of Section 8(a) graduate companies revealed: (1) the majority of the firms fell within the top quartile of the nation's minority-owned firms, see Senate

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[17] The success of minority business opportunity programs has been somewhat remarkable given the degree of resistance that the programs have engendered and the fact that the programs are new and still evolving. Consequently, some types of programs have proven more successful than others.

Small Business Report, supra note 15, at 15; and (2) more than one half of the firms continued to receive government and commercial contracts even when required to participate in competitive bidding, many from their previous Section 8(a) sources. Id. at 25, 33.

The Disadvantaged Business Enterprise ("DBE") requirement of STAA has proven equally effective.[18] From the three years immediately preceding STAA's passage to the three years immediately following, contract awards to disadvantaged business enterprises more than tripled from 9,450 to 32,500 with corre-

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[18] PWEA also was successful. Employment by black heavy construction contractors rose 122.5 percent from 1977 to 1982. Among black highway and street construction firms, receipts increased during the same period by 223.7 percent. These increases have been linked to PWEA. R. Suggs, Recent Changes in Black-Owned Business, Joint Center for Political Studies 12-13 (1986).

sponding values soaring from $1.03 billion to more than $3.26 billion.[19] Most states reported a doubling or tripling of the number of DBE firms certified for highway construction work between 1983 and 1984.[20]

In Massachusetts, an executive-ordered minority business opportunity plan containing set-aside provisions has produced spectacular results in only three years. From 1985 to 1987, procurement from minority firms more than dou-

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[19] See Betts and Giles, Dole Advocates Greater Business Opportunities, Foresees Minority Entrepreneurs Becoming Integral Part of the Transportation Industry, Minority Business Today, July, 1986, at 17, 18. (Minority Business Development Agency, U.S. Department of Commerce).

[20] See Draft Report of D.O.T., supra note 15, at 70 (including both existing firms which may not have previously been engaged in highway construction and new companies formed in response to the program).

bled.[21] As of 1987, Massachusetts let $146.5 million worth of business to minority-owned firms constituting 10.4 percent of all discretionary services purchased and 9.4 percent of all discretionary construction work purchased. Mass. Report at 1. Massachusetts contracting with minority-owned vendors increased from 368 firms in fiscal year 1984 to 813 firms in fiscal year 1987. Id. at 6.

Atlanta's adoption of a minority business opportunity plan is viewed as a vehicle for all its citizens to participate fully in the economic development of the Metropolitan Atlanta area.

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[21] See Minority Business Program FY87 Annual Report at 1 [hereinafter Mass. Report] (a copy is attached at tab B in the Compendium of Minority Business Opportunity Plan Reports lodged with the Clerk of the Court and sent to the parties).

Prior to Atlanta's adoption of a 25 percent minority-owned business participation goal in 1982, minority business participation in city contracting averaged about two percent. In 1987, minority-owned business participation exceeded 36 percent of all Atlanta city contracts.[22]

These programs have been emulated by quasi-public and private sector entities. Conrail's voluntary minority-owned business opportunity program graphically demonstrates the long-term competitive benefits derived from such programs. For calendar years 1982, 1983, 1984 and the first nine months of 1985

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[22] See Executive Summary: 1986 Office of Contract Compliance Annual Report (March 31, 1987) (a copy is attached at tab C to the Compendium of Minority Business Opportunity Plan Reports lodged with the Clerk of the Court and sent to the parties).

Conrail obtained savings of $3,589,727 on purchases from minority-owned businesses totalling $127,747,765.[23]

Accordingly, minority business opportunity programs have a demonstrated record of success as an important tool in eliminating the remaining barriers to equality in the marketplace. They create a positive environment in which minority-owned businesses can flourish and grow into viable competitive enterprises. The Fourth Circuit's flawed analysis should not be permitted to eviscerate these necessary measures.

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[23] See Affirmative Action Report of Consolidated Rail Corporation Ethics Committee (comparing similar purchasing from non-minority-owned business for a similar study period preceeding the affirmative action program) (a copy is attached as tab D to the Compendium of Minority Business Opportunity Plan Reports lodged with the Clerk of the Court and sent to the parties).

II.

RICHMOND'S MBU PLAN IS CONSTITUTIONAL

The Richmond Minority Business Utilization Plan represents a good faith effort by a responsible municipal government to address pervasive discrimination within its jurisdiction. Richmond acted in a manner mindful of the constitutional rights of non-minority contractors, such as Appellee Croson, who would be required to share the light burdens imposed to effectuate the MBU Plan's affirmative action goals. After determining that it had the authority and a compelling interest to enact a remedial program to address discrimination in public sector construction contracting, the Richmond City Council carefully studied the permissible parameters of affirmative action

programs as defined in Fullilove[24] and Bakke.[25] It then crafted a narrowly tailored minority business opportunity program -- the MBU Plan. Contrary to the Fourth Circuit's opinion, that Plan is entirely consistent with the standards established by this Court governing the constitutionality of such programs.

A. Richmond Had A Compelling Interest In Remedying Discrimination In Construction Contracting

The first requirement of a state-sponsored minority preference program is that it "must be justified by a

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[24] There, the Court found the Minority Business Enterprise provision, § 103(f)(2), of the Public Works Employment Act of 1977, 91 Stat. 116, 42 U.S.C. § 6705(f)(2) (Supp. II 1976) an appropriate balancing of the federal government's competing obligations to remedy pervasive discrimination in the construction industry nationwide and to treat non-minority contractors fairly. 448 U.S. at 480-89.

[25] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

compelling governmental interest." Wygant v. Jackson Bd. of Educ., 476 U.S. at 274 (1986) (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984)). Wygant requires only that the state "ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination." Id. at 277. Statistical disparities, among other indicia, may be sufficient to provide convincing evidence of prior discrimination. Id. at 292 (O'Connor, J., concurring). See also Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977).[26]

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[26] Contrary to the Fourth Circuit's interpretation, Wygant does not require an express contemporaneous finding by the state that it previously had engaged in discrimination. Justice O'Connor, concurring, stated that "a

(Footnote continued)

In this case, the district court found that the Richmond City Council had "ample evidence" of discrimination in public sector construction contracting to support its compelling interest in enacting a minority business opportunity plan. Supplemental Appendices to Jurisdictional Statement [hereinafter Supp. App.] at 172. It made this finding after reviewing the evidence considered by the City Council, including: (1) a statistical disparity between Richmond's

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(Footnote 26 continued from previous page)
contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan." Wygant, 476 U.S. at 289. See also United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 165-166 (1977); McDaniel v. Barresi, 402 U.S. 39, 41 (1971). Accordingly, the Fourth Circuit is wrong as a matter of law in finding the plan unconstitutional on the basis that Richmond did not admit and document its culpability for past discrimination against minority contractors.

50 percent minority population and its award of only 0.67 percent of its construction-contract dollars, over five years, to minority contractors;[27] (2) representations by construction trade associations that there were very few minority-owned businesses in their industry; (3) testimony by a city councillor and the city manager that there was discrimination on the basis of race in Richmond public sector construction contracting; and (4) congressional findings of

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[27] A similar statistical comparison was approved by this Court in Fullilove. There, the percentage of blacks in the United States population was compared with the percentage of black-owned businesses obtaining government construction contracts. Fullilove, 448 U.S. at 478. Such statistics are indicative of an environment in which "otherwise qualified" minority individuals and businesses are actively discouraged from participating as a result of a "self-recognized inability" to surmount the barrier of race. Dothard v. Rawlinson, 433 U.S. 321, 330 (1977).

nationwide discrimination in the construction industry. Supp. App. at 164-165. The district court also took judicial notice of historical barriers to entry by minority-owned businesses into the construction industry:

> The fact that very few minority construction businesses even exist is consistent with, not opposed to, a finding that minorities have suffered past discrimination in the [Richmond] area's construction industry. It suggests, of course, that past discrimination has stymied minority entry into the construction industry in general, as well as participation in [Richmond] government construction contracting in particular.

Supp. App. at 167.

Such findings may not be disturbed by an appellate court unless clearly erroneous.[28] In the instant

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[28] See Wygant, 476 U.S. at 277; Anderson v. Bessemer City, 470 U.S. 564, 573 (1985); Rogers v. Lodge, 458 U.S. 613, 623 (1982); Pullman-Standard v. Swint, 456 U.S. 273, 287-88 (1982); Fed. R. Civ. P. 52(a).

case, however, the Fourth Circuit failed to accord any deference to the district court's findings. Instead, it revisited the City Council's deliberations and substituted its own reactions to that record.[29] It did not, however, cite any evidence in the record -- and there is none -- establishing that the district court's findings were clearly erroneous.

For example, the district court found the statistical comparison between Richmond's minority population and minority participation in City construction

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[29] "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as trier of fact, it would have weighed the evidence differently." Anderson v. Bessemer City, 470 U.S. at 573-74 (1985). Moreover, if factual findings of a district court are inadequate a court of appeals should not find fact on its own, but rather should remand for further fact finding. Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986).

contracts to be persuasive evidence of discrimination.[30] Strikingly, the Fourth Circuit declared the same statistical evidence "spurious." Croson, 822 F.2d at 1359. Additionally, the district court found that the testimony before the City Council supported the conclusion that "there was discrimination and exclusion on the basis of race in the construction industry, in both Richmond and the state." Supp. App. at 164-65. The Fourth Circuit found the same testimony "nearly weightless." Croson, 822 F.2d at 1359. Finally, the Fourth Circuit improperly disregarded the district court's judicial notice of barriers to entry and

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[30] Supp. App. at 168-69 ("dismally low level of minority business participation in City's prime contracts").

historical discrimination in Richmond. Supp. App. at 166.[31]

Accordingly, the district court's holding that there was ample evidence to establish that Richmond had a compelling interest in enacting the MBU Plan meets applicable legal standards and is supported by the record. The Fourth Circuit's contrary conclusion was based on an erroneous reading of Wygant and its own improper findings of fact.

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[31] There can be no doubt that Richmond committed such discrimination. For example, in Richmond "there has been state (also federal) action tending to perpetuate apartheid of the races. . . ." Bradley v. School Board of Richmond, 462 F.2d 1058, 1065 (4th Cir. 1972), aff'd, 412 U.S. 92 (by an equally divided court; Powell took no part in the consideration or decision), reh'g denied, 414 U.S. 884 (1973). After a "sordid history" of attempts to "circumvent, defeat, and nullify the holding of Brown I," Richmond did not take even "feeble steps" to implement school desegregation until 1963. Id. at 1074-75.

B. The MBU Plan Is Narrowly Tailored to Remedy Discrimination In Construction Contracting in Richmond

The second requirement of a state-sponsored affirmative action plan is that it "be 'narrowly tailored to the achievement of that goal.'" Wygant, 476 U.S. at 274; Fullilove, 448 U.S. at 480. When the state has demonstrated a compelling interest in remedying such discrimination, it is entitled to a presumption that the remedial action chosen is a proper method to address the discrimination. Wygant, 476 U.S. at 293 (O'Connor, J., concurring). Thus, "[t]he ultimate burden remains with the [plaintiff] to demonstrate the unconstitutionality of an affirmative-action program." Wygant, 476

U.S. at 277-78.[32] That presumption may be overcome only when the trial court, in its sound discretion, finds that the remedies selected "impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected." Id. at 287.

In the instant case, the district court concluded that "[p]laintiffs have not shown in any way how the burdens that the Plan may place on innocent third parties would be excessive as a constitu-

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[32] As this Court and others have recognized, it is of crucial importance to place the burdens of proof on the appropriate parties. See e.g., Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) (reversing on wrong burden); Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977); Toney v. Block, 705 F.2d 1364, 1367 (D.C. Cir. 1983).

tional matter." Supp. App. at 197.[33] The district court's analysis is well reasoned and reflected a proper exercise of its abundant discretion. It also is fully consistent with this Court's reasoning in Fullilove that

> by its objective of remedying the historical impairment of access, the [minority business opportunity program] can have the effect of awarding some contracts to [minority-owned businesses] which otherwise might be awarded to other businesses . . . . It is not a constitutional defect in [the

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[33] In reaching this conclusion the court balanced the reasonableness of a 30 percent set-aside in light of a 50 percent minority population, Supp. App. 173-80; the flexibility of the Plan given its "meaningful waiver provision," Supp. App. 181-93; the City Council's consideration of "the efficacy of alternative responses," Supp. App. 193-95; and the temporary nature of the Plan, Supp. App. 195; against "the burden on non-MBE prime contractors of seeking out MBE's to participate as subcontractors on City construction projects; and the burden on non-MBE subcontractors who would have received some of the City's construction contracting business but for the City's Plan." Supp. App. at 196-98.

> program] that it may disappoint the expectations of nonminority firms . . . such "a sharing of the burden" by innocent parties is not impermissible.

448 U.S. at 484 (quoting Franks v. Bowman Transp. Co., 424 U.S. 747, 777 (1976)). See also United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

The Fourth Circuit disregarded this line of authority and mistakenly patterned its analysis of the MBU Plan's constitutionality on this Court's holding in Wygant that the Jackson Board of Educations's layoff plan violated the Fourteenth Amendment.[34] State-sponsored

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[34] The Fourth Circuit also misplaced the burden of proof regarding the constitutionality of the MBU Plan on Richmond. Once the state demonstrates a compelling interest, the plaintiff must prove the government's

> evidence did not support an inference of prior discrimination and thus a remedial purpose, or that

(Footnote continued)

layoff plans present special circumstances in which the State must "meet a heavy burden of justification." Wygant, 476 U.S. at 282 n.10. Accordingly, the scrutiny applied to layoff plans which "impose the entire burden of achieving racial equality on particular individuals," Wygant, 476 U.S. at 282-283, is very different from that applied to minority business opportunity plans where the "actual burden shouldered by nonminority firms is relatively light." Wy-

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(Footnote 34 continued from previous page)

> the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored." Only by meeting this burden could the plaintiff's establish a violation of their constitutional rights, and thereby defeat the presumption that the [state's] assertedly remedial action based on the statistical evidence was justified.

Wygant, 476 U.S. at 293 (O'Connor, J., concurring).

gant, 476 U.S. at 282 (quoting Fullilove, 448 U.S. at 484); see also Johnson v. Transp. Agency, 107 S.Ct. 1442, 1451 (1987); Weber, 443 U.S. at 208.

As a result of its failure to recognize this distinction, the Fourth Circuit applied the wrong standard in analyzing the constitutionality of the MBU Plan. Its conclusion that the burdens imposed by the Plan on non-minority contractors deprives those contractors of equal protection under the law directly conflicts with well established authority. The Fourth Circuit's decision therefore should be reversed.

III

IF THIS COURT AFFIRMS THE FOURTH CIRCUIT THE PRACTICAL RESULT WILL BE TO RENDER MINORITY BUSINESS OPPORTUNITY PROGRAMS INEFFECTIVE

As demonstrated above, minority business opportunity programs are an

effective tool in state and local efforts to eradicate discrimination-based barriers which have impaired the access of minority-owned firms to public contracts. An affirmance of the court of appeal's decision will have a chilling impact on the continuing effectiveness of these necessary programs.

The Fourth Circuit's majority opinion would effectively preclude state and local governments from adopting any minority business opportunity program absent an admission of prior discrimination. Such a requirement is likely to thwart governmental efforts to remedy past discrimination. As Justice O'Connor explained: "[T]he imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severe-

ly undermine public employers' incentive to meet voluntarily their civil rights obligations." Wygant, 476 U.S. at 290 (O'Connor, J., concurring). See, e.g., Johnson, 107 S.Ct. at 1451 n.8.

In addition, if the Court upholds the notion that set-aside provisions in minority business opportunity programs must be based on the small percentage of existing minority-owned firms, such programs will perpetuate, rather than remedy, discrimination. As Judge Sprouse argued in dissent below, under such a limited scope for minority opportunity programs, "truly pernicious discrimination could have the compound effect of blocking remedial action." Croson, 822 F.2d at 1365 n.11 (Sprouse, J., dissenting).

Finally, if the same "heavy burden for justification" is placed on

minority business opportunity programs as is placed on layoff plans, it will be virtually impossible to draft a minority business opportunity plan which can both remedy discrimination effectively and withstand constitutional scrutiny.

Accordingly, a decision by this Court to affirm the Fourth Circuit will, as a practical matter, deprive state and local government of effective use of minority business opportunity plans to remedy economic discrimination within their jurisdictions.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

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On Appeal from the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE STATE OF MARYLAND AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF AMICUS CURIAE

Through enactment of Minority Business Enterprise ("MBE") legislation, Maryland has made a strong commitment to redress longstanding discrimination against certain minority groups. See Md. State Fin. & Procure. Code Ann. § 11-148 (1985). The

Maryland MBE legislation is similar to, though less far-reaching than, the race-conscious legislation adopted by Richmond. Consequently, the decision by the Court of Appeals casts a shadow over Maryland's MBE law -- and over hundreds of other similar laws throughout the country.

SUMMARY OF ARGUMENT

Race-conscious legislation is constitutional if its purpose is to remediate prior racial discrimination and if the relief is reasonably designed to achieve that purpose. Wygant v. Jackson Board of Education, 476 U.S. 267, 106 S.Ct. 1842 (1986), does not compel rigid application of the strict scrutiny test to State affirmative action plans. Misinterpreting Wygant, the Court of Appeals in this case measured the Richmond statute against a Draconian strict scrutiny standard that permitted no leeway for legitimate legislative judgment. The

affirmative action jurisprudence of this Court indicates that a less rigid, "intermediate" standard of review should be applied to MBE legislation. A court should consider the totality of the circumstances justifying imposition of affirmative action legislation to determine whether the Equal Protection Clause is offended.

ARGUMENT

This case raises two fundamental issues: 1) Can or should a government's buying decisions be required to be "color-blind," or is race-conscious action appropriate if its purpose is remedial? 2) If race-conscious action for remedial purposes is appropriate, what standard should be used to determine its constitutionality?

The answer to the first question is clear: The affirmative action trilogy, Regents of the University of California v. Bakke, 438 U.S. 265 (1978); United

Steelworkers of America v. Weber, 443 U.S. 193 (1979); and Fullilove v. Klutznick, 448 U.S. 448 (1980), explicitly or implicitly has already upheld the propriety of race-conscious remedies. Under these and other decisions, some form of race-consciousness is permitted, if only for the purpose of monitoring and enforcing court judgments. 1/

The second question is more difficult. The majority in J.A. Croson Co. v. City of Richmond, 822 F.2d 1355 (4th Cir. 1987), relying on Wygant, chose to apply a rigid form of strict scrutiny. Wygant involved a constitutional challenge to a voluntary provision in a public sector contract that required the layoff of more senior white

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1/ Professor Days notes that the explicit use of race for purposes of student assignment was often unavoidable after Brown v. Board of Educ., 347 U.S. 483 (1954). Days, Fullilove, 96 Yale L.J. 453, 548 (1987) (citing Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1 (1971)).

teachers in order to keep less senior black teachers. The articulated purpose of the plan was to remedy "societal discrimination" by providing minority "role models."

In the course of five separate opinions, the Court set aside the plan. Taken as a whole, however, Wygant does not require a rigid application of the strict scrutiny test to MBE or similar affirmative action programs. A majority of this Court disapproved the plan primarily because the layoffs were deemed to be too great an imposition on white teachers' vested seniority rights and secondarily because it found inadequate "societal discrimination" justification. 2/

2/ The plurality opinion of Justice Powell (joined by Chief Justice Burger and Justice Rehnquist) ruled against the plan because there was no evidentiary basis to conclude that there had been prior hiring discrimination and because they disapproved of the "role model" or "societal discrimination" theory. They also concluded (Continued)

The Croson majority's reflexive application of a wooden analysis -- with its virtually automatic condemnation of the plan in question -- is a misreading of Wygant. It is also at odds with Fullilove. Despite a diversity of views on several aspects of that case, a majority of the Court endorsed a standard more flexible than rigid "strict scrutiny." The Court approved the legislation at issue in that case despite the

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that layoffs were too harsh but that hiring goals would be permissible. Justice O'Connor's concurring opinion also disapproved the "role model" theory but stated that a contemporaneous finding of identified discrimination was not necessary to support an affirmative action plan. Justice White's concurring opinion disapproved of a layoff plan which involved "the discharge of white teachers to make room for blacks, none of whom has been shown to be a victim of discrimination. . . ." 476 U.S. at ____, 106 S.Ct. at 1857. The main dissent by Justice Marshall (joined by Justices Brennan and Blackmun) approved the layoff plan and would not require a prior finding of discrimination. Justice Stevens' dissent approved the "role model" theory, stating that it was not necessary to find discrimination to support the plan.

absence of the type of explicit legislative findings said by the panel in Croson to be required.

The State of Maryland urges the Court to adopt a balanced approach, one that allows legislatures some discretion to make important policy judgments in this area. If the customary equal protection typology were used, this standard would be labeled "intermediate scrutiny." But, however termed, the standard should result neither in virtually automatic rejection nor virtually automatic approval of an MBE program. Rather, as Justice O'Connor put it, concurring in Wygant:

> Ultimately, the Court is at least in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and

adversely affected by a plan's racial preference.

476 U.S. at ____, 106 S.Ct. at 1853-54.

This realistic approach to equal protection, which eschews a result predetermined by the standard of review, is also reflected in the statements of other justices in Fullilove. 3/

3/ As Justices Marshall, Brennan and Blackmun wrote: "In our view, then, the proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives." 448 U.S. at 519. Justice Stevens wrote to the same effect, albeit in dissent: "Unless Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification, the Court should not uphold this kind of statute." 448 U.S. at 545. Justice Powell, in his separate concurrence, endorsed the use of a softened strict scrutiny analysis that, in cases involving the amelioration of "the disabling effects of identified discrimination," 448 U.S. at 497, permitted the compelling governmental interest requirement to be met if 1) the governmental body had authority to act in response to identified discrimination; 2) the governmental body made findings that showed prior discrimination; and 3) the racial (Continued)

The case law of affirmative action supports the use of several general criteria in assessing any MBE program. Used conjunctively, these analytical tools permit a court to make a reasoned analysis of all relevant circumstances to determine whether a program is a "moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities...." Johnson v. Transportation Agency, Santa Clara County, ___ U.S. ___, 107 S.Ct. 1442, 1457 (1987).

In Weber, this Court relied upon several factors which later court decisions have used to analyze the validity of a racial preference:

> [T]he plan does not unnecessarily trammel the interest of the white employees. The plan does not require the discharge of white

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classification was equitable and reasonably necessary to redress the identified discrimination. 488 U.S. at 498, 510, 516-17.

> workers and their replacement with new black hirees. . . . Nor does the plan create an absolute bar to the advancement of white employees . . . . . Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.

443 U.S. at 208 (citation omitted). 4/ Thus, the questions that must be asked regarding a state MBE program are:

1. Does the program create an absolute bar to the advancement of white businesses or otherwise trammel their interests?

2. Does the program take away any of

4/ We recognize that Weber addressed only the impact of Title VII on private sector affirmative action plans. The case did not involve the Equal Protection Clause. However, the Court's approach to key aspects of the Title VII analysis in Weber parallels its constitutional analysis in other cases. The two are not water-tight compartments, and guidance from the one setting may be adapted to the other. See Johnson v. Transportation Agency, 107 S.Ct. at 1462 (O'Connor, J., concurring in the judgment). See also, e.g., Ledoux v. District of Columbia, 820 F.2d 1293, 1301 (D.C. Cir. 1987); Hammon v. Barry, 813 F.2d 412, 430 (D.C. Cir. 1987).

the vested rights (or contractual obligations) of white business enterprises?

3. Is the plan temporary?

In addition, a number of other questions (drawn from the various opinions in the cases and from commentators) would illumine the purposes and effects of any MBE program:

4. Does the program have an articulated purpose and is it reasonably designed to achieve that purpose? Fullilove, 448 U.S. at 519 (Marshall, J., concurring).

5. What is the relationship between the decisionmaker and the burdened and the preferred groups? Wright, Color-Blind Theories and Color-Conscious Remedies, 47 U. Chi. L. Rev. 213, 233 (1980). 5/

5/ Chief Judge Wright has pointed out:
One consequence of this approach to affirmative action programs is that the courts must scrutinize somewhat more carefully those programs instituted by decisionmakers of the minority race. When black decisionmakers, for example, choose to disadvantage white persons,
(Continued)

6. Which "minorities" are relevant? Wygant, 476 U.S. at ____, 106 S.Ct. at 1852 n.13.

7. Is there a waiver provision in the plan and is the waiver provision flexible? 6/

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there is no a priori reason to assume that they are not acting out of prejudice or hostility. This does not mean, however, that all minority-instituted affirmative action programs must be struck down: such programs should merely be denied the presumptive validity granted programs instituted by the groups disadvantaged by them. We may no more assume that minority preference programs are "invidious" when members of a minority are in control than we may assume that policies disadvantaging members of minorities are necessarily benign on account of such control.

Wright, 47 U. Chi. L. Rev. at 236 (emphasis in original).

6/ A waiver provision avoids the semantic battle that has been waged over whether plans may have "goals" or "quotas." In the case of MBE programs, no matter if they are called "set-asides" or "sheltered markets" or "goals," the requisite flexibility has been reached if a flexible waiver has been provided.

8. Have alternatives short of explicit reliance on race been discussed? 7/

9. Has the relevant statistical finding been made?

This last criterion requires some elaboration. Wygant struck down sole reliance upon generalized findings of "societal discrimination." 476 U.S. at ____, 106 S.Ct. at 1847. We agree with the panel majority in Croson that such findings would

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7/ Professor Days puts it:

> I can see no good reason to require government agencies in this position to experiment with remedies that do not involve explicit racial classifications if these remedies offer no likelihood of success. Agencies should, however, demonstrate that these lesser alternatives were systematically and thoroughly explored prior to being rejected. This exploration may take many forms, including evaluation of relevant literature, consultation with experts, and assessment of the extent to which similarly-situated government agencies have found the alternatives effective.

Days, Fullilove, 96 Yale L.J. 453, 483 (1987).

not support a racial classification if they are the sole basis on which a governmental body relies. [8/] We further acknowledge the Croson majority's view that one of the many relevant statistical correlations is the one between the number of minority contractors who are eligible to handle government contracts and the number of minorities actually awarded contracts. 822 F.2d at 1359.

However, MBE plans properly serve two purposes: 1) to open a market for existing MBE's; and 2) to encourage MBE's to form and participate in previously "chilled" markets. For the first purpose, the kind of particularized local statistical showing required by Croson may be useful. However,

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[8/] "National findings do not alone establish the need for action in a particular locality." J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1359 (4th Cir. 1987) (emphasis added).

as Professor Days points out, the use of statistics should not be allowed to disserve the second purpose: "These percentages might then be increased, if findings of discrimination support it, to reflect the number of minority entrepreneurs who were deterred in the past from entering the [subject] business because of racial barriers, but who are likely to take advantage of the remedial program." Because this "chilling effect" is hard to quantify, some allowance should be made for legislative bodies to consider state or local population percentages or other national data which can shed light on the potential problem. Days, Fullilove, 96 Yale L.J. 453, 484 (1987).

These criteria are not meant as some kind of arithmetical exercise. They should be considered together in order to weigh realistically the totality of circumstances surrounding an MBE plan.

In sum, we urge that the standard of review and the criteria for its application be framed, as Justice O'Connor wrote in her concurrence in Wygant, so that a legislature should only be required to have a "firm basis for determining that affirmative action is warranted." 106 S.Ct. at 1856.

CONCLUSION

The decision of the Court of Appeals should be reversed and the case remanded for application of the intermediate scrutiny standard set forth.

Respectfully submitted,

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No. 87-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.

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QUESTION PRESENTED

Whether the Fourteenth Amendment prohibits a Municipality from enacting an ordinance requiring prime contractors to subcontract a portion of their city contracts to minority businesses.

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No. 87 - 998

IN THE

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OCTOBER TERM, 1987

CITY OF RICHMOND

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

ON APPEAL FROM THE
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FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLANT

INTEREST OF AMICUS

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist blacks to secure their constitutional and civil rights by means of litigation. Since 1965 the Fund's attorneys have represented

plaintiffs in several hundred employment discrimination actions under Title VII and the Fourteenth Amendment, including many of the employment discrimination cases decided by this Court. In attempting to frame remedies to redress, prevent and deter discrimination, we have repeatedly found, as have the courts hearing those cases, that race-conscious numerical remedies are, for a variety of pragmatic reasons, a practical necessity. The Legal Defense Fund believes that its experience in this area of litigation and the research it has done will assist the Court in this case. The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

In the years since this Court's decision in Fullilove v. Klutznick, 448 U.S. 448 (1980), minority set-aside programs have been widely adopted by state and local governments. Many of these programs, including the program at issue here, were modeled on the federal program upheld in Fullilove. The decision of the Fourth Circuit, invalidating Richmond's program, challenges the authority of state and local governments to prohibit discrimination by private parties contracting with the city, and accordingly to remedy the effects of that discrimination.

The Fourteenth Amendment does not provide a basis for this limitation of the power of state and local governments. Indeed, state and local authorities have

an important and compelling interest in addressing economic disparities in their communities. This interest is particularly compelling when that disparity is rooted in racial discrimination.

The legislative history of the Fourteenth Amendment unambiguously establishes the permissibility of racial classifications offered to remedy the effects of invidious discrimination. Significantly, the Congress which passed the Amendment also adopted a number of race-conscious laws designed to ameliorate the economic condition of blacks during the post Civil War period.

The focus of state and local minority set-aside programs, using the federal program as a model, has been aimed at similar problems. Where Congress found a national pattern of exclusion of blacks

from government contracts and the attendant inhibitions to the development of black business, state and local governments have found the same. Where Congress moved to remedy this economic disparity, state and local governments have made similar efforts.

Such voluntary initiatives by state and local governments, which have adopted as their own the national goal of equal opportunity, should not be thwarted.

ARGUMENT

I.

MUNICIPALITIES HAVE A SUFFICIENTLY WEIGHTY STATE INTEREST IN PROGRAMS THAT GIVE MINORITY COMMUNITIES INDEPENDENT ECONOMIC VIABILITY

Federal, State and Municipal governments have a sufficiently weighty

state interest in increasing the economic strength of the minority community, whether that interest is defined as "compelling" or "important". This is particularly the case where, as here, the obstacles facing minority business persons have their roots in historical patterns of racial discrimination.

> "These problems, which are economic in nature, are the result of past social standards which linger as characteristics of minorities as a group."[1]

Notably, this Court has indicated that there may be several ways in which to define a state's interest in affirmative action efforts, which do not necessarily require a determination of discrimination.

> . . . [A]though its precise contours are uncertain, a state interest in the promotion of racial diversity has been found

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[1] Subcommittee on Minority Small Business Enterprise of the House Small Business Committee H. Rep. 92-1615, p. 3.

> sufficiently "compelling" at least in the context of higher education, to support the use of racial considerations in furthering that interest. See, e.g., Bakke, 438 U.S. at 311-315 . . . (Opinion of Powell, J.,) . . . And certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently "important" or "compelling" to sustain the use of affirmative action policies.

Wygant v. Jackson Board of Education, 476 U.S. ___, ___ , 90 L.Ed. 2d 260, 276-277 (1986).

In 1975 the Subcommittee on Minority Small Business Enterprise of the House Small Business Committee observed that,

> While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals.[2]

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2 H. Rep. 94-468, pp. 1-2.

The problem there identified continues to plague the minority community today. That is, while minority persons comprise 15.2%[3] of the nation's population, the latest economic figures available show that only approximately 5% of businesses are owned by minorities and that they receive only 1-2% of the gross receipts from all contracting.[4]

It is now well established that governmental bodies ". . . may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination". United States v. Paradise, 107 S.Ct. 1053, 1063 (1987). Indeed the Court's commitment to

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[3] Current Population Survey, U.S. Census Bureau (Mar. 1987).

[4] Survey of Minority-Owned Business (U.S. Census Bureau 1982); 1982 Economic Census (U.S. Census Bureau 1982).

this principle has substantially diminished the difference between whether the government's interest in remedying such discrimination is "compelling" or "important". See Wygant v. Jackson Board of Education, 90 L.Ed. 2d 260, 268 (1986)(opinion of Powell, J.,)(the means chosen must be "narrowly tailored" to achieve a "compelling government interest"); id., at 276, (O'Connor, J. concurring)("The Court is in agreement that . . . remedying past or present racial discrimination. . . is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program"); id., at 286, (Marshall, J., dissenting, joined by Brennan, J. and Blackmun, J.)(remedial use of race permissible if it serves "important governmental objectives"

and is "substantially related to achievement of those objectives").

It follows that the attempts, whether by Congress, or by State or Municipal legislatures, to prevent the perpetuation of discrimination in the construction industry, satisfies the governments' "legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination". University of California Regents v. Bakke, 438 U.S. 265, 307 (1978) (Opinion of Powell, J.)

The use of such race-conscious measures here, as in the federal acts approved by this Court in Fullilove v. Klutznick, 448 U.S. 448 (1980), and as replicated by cities and municipalities around the country as they have tried to deal with similar problems of discrimination, is with consistent with the use

of such measures as envisioned by the Congress which fashioned the Fourteenth Amendment.

II.

THE FOURTEENTH AMENDMENT SUPPORTS THE USE OF GOVERNMENT PROGRAMS TO IMPROVE ECONOMIC AND OTHER OPPORTUNITIES FOR RACIAL MINORITIES[5]

The Congress which fashioned the Fourteenth Amendment squarely considered the propriety of race-conscious remedies in support of black victims of racial discrimination. Thus while the Amendment

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[5] For an extensive discussion of the Fourteenth Amendment and the series of social welfare laws adopted by the Congress which fashioned that amendment See, Brief of the NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae, The Regents of the University of California v. Allan Bakke, No. 76-811; See also, Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Virginia L. Rev. 753 (June 1985).

plainly prohibits any racial classification which has the purpose or effect of stigmatizing as inferior any racial or ethnic group,[6] the history of

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[6] Certainly a perception of the unconstitutionality of invidious and stigmatizing racial classifications was at the heart of this Court's landmark decision in Brown v. Board of Education, 347 U.S. 483 (1954). See also, Strauder v. West Virginia, 100 U.S. 303, 308 (1880). Cf. United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977), there, three members of the Court found New York's redistricting plan constitutionally acceptable despite the fact that the State "used race in a purposeful manner" because "its plan represented no racial slur or stigma with respect to whites or any other race" - the State's action was thus "not discrimination violative of the Fourteenth Amendment." 51 L.Ed. 2d at 246 (opinion of Justice White for the Court). Two other members of the Court agreed that "[u]nder the Fourteenth Amendment the question is whether the reapportionment plan represents purposeful discrimination against white voters . . . . The clear purpose with which the New York Legislature acted - in response to the position of the United States Department of Justice under the Voting Rights Act- forecloses any finding that it acted with the invidious purpose of discriminating against white voters." 51 L.Ed. 2d at 254-255 (concurring opinion of Justice

the Fourteenth Amendment demonstrates that the framers intended it to legitimate and to allow implementation of race-specific remedial measures where a substantial need for such programs was evident. Indeed, Congress believed that such programs were not merely permissible but necessary.

From the closing days of the Civil War until the end of civilian Reconstruction, Congress adopted a series of social welfare laws expressly delineating the entitlement of blacks to participate in or benefit from various programs. Congress adopted these race-specific measures over the objections of critics who opposed such special assistance for a single racial group. The most far reaching of these programs, the 1866 Freedmen's Bureau Act, was enacted less than a month after Congress approved

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Stewart)

the Fourteenth Amendment, and there is substantial evidence that a major reason Congress adopted the Amendment was to provide a clear constitutional basis for such race-conscious remedies.

The range and diversity of these measures is striking. However, they share the clear aim of assisting and encouraging blacks in attaining some measure of economic independence, notwithstanding the ravages and consequences of slavery. The Bureau of Refuges, Freedmen and Abandoned Lands, (popularly known as the Freedman's Bureau) was authorized by Congress in 1866 to provide land and buildings and spend designated funds for "the education of the freed people,"[7] but could provide no such aid to refugees or other whites. The same statute conveyed a number of disputed

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[7] 14 Stat., c.200 at 174, 176 (1866).

lands to "heads of families of African races" and authorized the sale of some thirty-eight thousand other acres to black families who had earlier occupied them under authority of General Sherman.[8] Congress in 1867 made special provision for disposing of claims for "pay, bounty, prize-money, or other moneys due . . . colored soldiers, sailors, marines, or their legal representatives".[9] It awarded federal charters to organizations

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[8] 14 Stat., c.200 at 174, 175 (1866). The statute referred simply to "such persons and to such only as have acquired and are now occupying lands under and agreeably to the provisions of General Sherman's special field order, dated at Savannah, Georgia, January sixteenth, eighteen hundred and sixty-five." That order, as Congress well knew, provided that the land in question in South Carolina Georgia was "reserved and set apart for the settlement of the negroes now made free by the acts of war and the proclamation of the President of the United States". II W. Fleming, Documentary History of Reconstruction 350 (1906).

[9] 15 Stat., Res. 25 at 26 (1867).

established to "suppor[t] . . . aged or indigent and destitute colored women and children,"[10] to serve as a bank for "persons heretofore held in slavery in the United States, or their descendants,"[11] and to "educate and improve the moral and intellectual condition of . . . the colored youth of the nation"[12]. These youths were also provided assistance in the form of funds[13] and land grants.[14] Express appropriations were made for "the relief of freedmen or destitute colored people in the District of Columbia,"[15] and

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10 12 Stat., c.33 at 650 (1863).

11 13 Stat., c.92 at 511 (1865).

12 12 Stat., c.103 at 796 (1863).

13 14 Stat., c.296, 317,(1863). Such assistance continued after the end of Reconstruction.

14 12 Stat., c.33 at 650 (1863). Such assistance continued after the end of Reconstruction.

15 15 Stat., Res. 4 at 20 (1867).

for a hospital for freedmen established in the District.[16] No comparable federal programs existed or were established for whites, although a few programs, while open to all blacks, were also available to a limited group of whites, the unionist refugees who fled to the North during the Civil War. Such white refugees were entitled, along with the freedmen, to up to 40 acres of land from among property seized by the United States from confederate sympathizers.[17]

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[16] See e.g., 16 Stat., c.14, 8 (1869); 16 Stat., c.114 at 506-507 (1871); 17 Stat., 366, 528 (1872). In years prior to these appropriations the hospital was supported by the Freedman's Bureau.

[17] 13 Stat., c.90 at 508-509 (1865); this 1865 program, however, was largely eliminated when President Johnson directed the return of most of the seized property to its original owners. See Report of the Commissioner of the Bureau of Refugees, Freedmen and Abandoned Lands, H.R. Exec. Doc. No. 11, 39th Cong. 1st Sess. 4-5 (1865); II O. Howard, Autobiography 229, 233, 235 (1907); II J. Blaine, Twenty Years in Congress 164

These racial distinctions imposed by Congress were neither inadvertent nor unopposed. A vocal minority in Congress, as well as President Johnson, criticized such proposals as class legislation discriminating against whites. A substantial majority of the Congress, however, believed such special treatment was appropriate and necessary to remedy the past mistreatment of blacks.

The Fourteenth Amendment was fashioned and approved by the same Congress that deliberately enacted race-conscious remedies for the exclusive or primary benefit of blacks. Indeed, one of the chief purposes of the Fourteenth Amendment was to provide a constitutional

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(1886); G. Bently, A History of the Freedmen's Bureau 89-96 (1955).

basis for the remedies which the Thirty-Ninth Congress had already adopted.[18]

> The one point upon which historians of the Fourteenth Amendment agree, and, indeed which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills. . . beyond doubt. . . .[T]he new amendment was written and passed, at the very least, to make certain that that s t a t u t o r y p l a n w a s constitutional, to remove doubts about the adequacy of the Thirteenth Amendment to sustain it, and to place its substantive

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[18] See H. Flack, The Adoption of the Fourteenth Amendment 11 (1908):

> "The legislation preceding the adoption of the Amendment will probably give an index to the objects Congress was striving to obtain or to the evils for which a remedy was being sought. . . This legislation, together with the debates in Congress, while being considered by that body, as well as the debates on the Amendment itself, should afford . . . sufficient material and facts on which to base a fairly accurate estimate of what Congress intended to accomplish by the Amendment."

provisions in the Constitution.[19]

When President Johnson on February 19, 1866, vetoed the first Freedmen's Bureau Bill of 1866, he had questioned whether the measure was "warranted by the Constitution" and challenged in particular the authority of Congress to spend funds, at least outside the District of Columbia, for the assistance of any class of the needy. In that month, Congress was already debating an early draft of the Fourteenth Amendment, H.R. 63, which gave Congress the authority similar to that now contained in Section 5.[20] On February 28,

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[19] J. tenBroek, Equal Under Law 201, 203 (1965).

[20] The Amendment then before the House provided, "The Congress shall have power to make all laws which shall be necessary and proper to secure the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection of the rights of life, liberty, and property". H.R. 63,

1866, nine days after the veto, Congressman Woodbridge, after reciting the need for federal aid to destitute freedmen, argued:

> But it may be said that all this may be done by legislation. I am rather inclined to think that most of it may be so accomplished. But the experience of this Congress in that regard has been most unfortunate. Sir, I cast no imputation upon the President of the United States . . . . But inasmuch as the President, honestly, I have no doubt, has told us that there were constitutional difficulties in the way. I simply suggest that we submit the proposition to the people, that they may remove these objections by amending the instrument itself.[21]

The Freedmen's Bureau Act of 1866, the Reconstruction measure which probably contained the most race-specific remedial legislation, was considered simultaneously in Congress with the Fourteenth Amendment.

39th Cong., 1st Sess. (1866) Globe 1034.

21 Id. at 1088.

The House passed the Amendment on May 10, 1866, the Senate voted a modified version on June 8, 1866,, and the House acquiesced in the Senate changes on June 13.[22] The House approved the second Freedmen's Bureau Act on May 29, 1866, the Senate voted a modified version on June 26, 1866,[23] and the Conference Report was adopted on July 2 and 3, 1866. On several occasions the Act was debated in one House at the same time the Amendment was being debated in the other.[24]

Moreover, the same legislators who comprised the two-thirds majority necessary to override President Johnson's second veto of the Freedmen's Bureau Act of 1866 also composed the two-thirds

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22 Id. at 2545, 3042, 3149.

23 Id. at 2773, 3413, 3524, 3562.

24 See e.g., Id. at 2799, 2807, 2869, 2977.

majority who approved the Fourteenth Amendment.[25] The sponsors of the Amendment, Congressman Stevens and Senator Wade, as well as its apparent author, Congressman Bingham, all voted for the Freedmen's Bureau Act. The sponsors of the Act, Senator Trumbull and Congressman Eliot, voted for the Amendment; Eliot spoke at length in support of the Amendment,[26] and Trumbull wrote and sponsored the 1866 Civil Rights Act whose substantive provisions were the basis of section 1 of the Amendment.[27]

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[25] Of the 33 Senators and 104 Representatives who voted to override President Johnson's second veto of the Freedmen's Bureau Act, all who were present for the vote on the Fourteenth Amendment voted for it. Of the 33 Senators and 120 Representatives who voted for the Amendment, all but 4 representatives who were present for the vote or the veto voted to override it. Id. at 3042, 3149, 3842, 3850.

[26] See, e.g., id. at 2511-12.

[27] See Flack, op. cit., at 55-97.

Congressman Stevens, introducing the Fourteenth Amendment to the House, described its basic purpose as providing for "the amelioration of the condition of the freedmen".[28] These are exactly the same words which Congressman Moulton used only three months earlier to describe the object of the first Freedmen's Bureau Bill of 1866.[29] This identity of phrasing reflects the similarity of purpose underlying the two measures. The supporters of the Act and Amendment regarded them as both consistent and complementary, while opponents viewed the two, together with the Civil Rights Act of 1866, as part of a single coherent, though in their view, undesirable, policy.[30] No

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28 Globe 2459.

29 Id. at 632.

30 Id. at 2501 (remarks of Rep. Shanklin); 2537-8 (remarks of Rep Rogers); 2941 (remarks of Sen. Hendricks); App.

member of Congress intimated he saw any inconsistency between the Thirteenth Amendment, which advocates of the bill contended provided authority to establish and continue the Bureau, and the Fourteenth Amendment. During the debates on the Amendment, opponents frequently went out of their way to criticize the Freedmen's Bureau,[31] while supporters of the Amendment praised the Bureau.[32]

The Thirty-Ninth Congress was fully aware of the race-conscious remedies and limitations contained in the Freedmen's Bureau Acts it passed in February and July of 1866. It could not conceivably have intended by its approval of the Fourteenth

---

239040 (remarks of Rep. Shanklin).

31 Globe at 2472 (remarks of Rep. W. Black); 2501 (remarks or Rep. Shanklin).

32 Id. at 1092 (remarks of Rep. Bingham 3034-35 (remarks of Sen. Henderson).

Amendment on June 12, 1866, to invalidate or forbid such remedies. The debates in that Congress literally ring with an uncannily modern reverberation: the opposition to the Freedmen's Bureau Acts and other race specific remedies was expressed in much the same terms as contemporary arguments against such measures as the Appellant's set aside program. These opponents - then and now- have contended that government should be prevented from providing special assistance for racial groups whose members have for generations suffered invidious discrimination, although the lack of remedial treatment is likely, as here, to perpetuate the exclusion of these groups from important areas of American life. This view was repeatedly and resoundingly rejected over a hundred years ago, and

insofar as such arguments are now raised, they do not withstand analysis.

III.

THE GOAL OF MINORITY SET-ASIDE PROGRAMS IS TO EXPAND THE ECONOMIC VIABILITY OF THE BLACK COMMUNITY, NOT SIMPLY TO APPORTION OPPORTUNITIES TO A LIMITED NUMBER OF EXISTING MINORITY CONCERNS

The Fourth Circuit's application of Wygant assumes that the purpose of the program was to apportion business to already existing black enterprises. This approach ignores the principle aim of all set aside programs: that is, providing a fair opportunity for excluded segments of the community to compete, by compensating for the competitive disadvantages they face because of their virtual exclusion from the marketplace. It follows that essential to the achievement of this goal

are programs which create as well as perpetuate black businesses.

The philosophical underpinning for these programs is particularly evident in the federal model, which Richmond and other cities have tried to emulate, and which this Court approved in Fullilove v. Klutznick, 448 U.S. 448 (1980).

The problems of minority business became a major federal priority in 1969 when President Nixon signed Executive Order 11458, providing for the development of a national program to assist "the establishment, preservation and strengthening of minority business enterprise." Section 1(a)(i). In 1971 and 1972 the subcommittee on Minority Small Business Enterprise of the House Small Business Committee conducted extensive hearings on the obstacles facing minority businesses. It concluded that

the obstacles had their roots in past racial discrimination. "These problems, which are economic in nature, are the result of past social standards which linger as characteristics of minorities as a group." H. Rep. 92-1615, p.3. The "long history of racial bias" to which minorities had been subjected invariably led, it found, to the lack of capital and experience which seriously handicapped the efforts of minority entrepreneurs. Id. at 3-4.

In 1975 that House subcommittee again conducted several days of hearings on this subject, and found the continuing problems of minority businesses to have the same origin.

> The effect of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely

> affected our present economic system.
>
> While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only $16.6 billion, or about 0.65 percent was realized by minority business concerns.
>
> These statistics are not the result of random chance. The presumption must be made that past discriminatory systems have resulted in the present economic inequities.[33]

The subcommittee reiterated that conclusion on January 3, 1977, two years later:

> The very basic problem disclosed by the testimony is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of

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33 H. Rep. 94-468, pp. 1-2.

> conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities.[34]

This latter report was issued less than two months before the adoption of the MBE provision by the House.

To eliminate the continuing effects on minority businesses of past discrimination, the federal government had adopted over 100 programs to aid minority businesses. These programs included

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[34] H. Rep. 94-1791, p. 132; see also S. Rep 91-1343, p. 45 (1970). A federal task force reached the same conclusion. Report of the Task Force on Education and Training for Minority Business Enterprise, p. 17 (1974) ("Decades of prejudice, poor educational opportunity, limited access to real management positions within American business and industry have conspired to restrict the entry of minorities into the mainstream of the nation's free enterprise system.")

financial, marketing and business management assistance.[35] But despite the substantial federal efforts to create and sustain minority businesses, those firms received less than one percent of all federal contracts.

The Minority Business Enterprise Amendment was introduced by Congressman Parren Mitchell of Maryland. In his remarks on the floor of the House, Congressman Mitchell plainly stated that the developmental purposes of the setaside program, and the wide ranging benefits he saw as flowing from that development.

> The Congress concerns itself with the fiscal problems of the cities, crime, and unemployment. I submit to my colleagues that urban development and fiscal stability is tantamount to minority business development; reductions

---

35 U.S. Department of Commerce, Office of Minority Business Enterprise. Federal Assistance Programs for Minority Enterprises (1977).

> in crime and a reevaluation in the value of life is tantamount to minority business development; and reductions in unemployment causing additional demand and growth are directly related to minority business development.
>
> I urge my colleagues to support my amendment and promote growth in the minority business community.[36]

As the history of the Minority Business Enterprise Amendment makes plain, Congress did not intend to wed the reach of the amendment to the artificially restricted pool of existing minority businesses. For example, as recounted by the Chief Justice in Fullilove, the Senate version of the MBE amendment, introduced by Senator Brooke of Massachusetts, contained a provision not included in the House version. Senator Brooke's provision sought to insure that the 10% figure did

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[36] 123 Cong. Rec. H 5098 (remarks of Rep. Mitchell)(daily ed. Feb. 23, 1977).

not constitute an inflexible quota in the face of a minority population which was fewer than 10%, by keying the set-aside to the number of minority businesses in the relevant community.

Senator Brooke's amendment would have tied the set-aside to the actual number of contractors only when the minority population was significantly less than 10%; however, even this limited effort to link the set-aside with the actual number of minority businesses as opposed to the percentage of minority population was rejected by the Conference Committee. Rather, as observed by Chief Justice Burger, "The Conference Committee Reports added only the comment: 'This provision shall be dependent on the availability of minority business enterprises located in the project area'". 448 U.S. at 462. [quoting S Conf Rep No. 95-110, p.11

(1977); HR Conf Rep No. 95-230, p.11 (1977). The Conference Committee bill was agreed to by the Senate, 123 Cong. Rec 12941-12942 (1977), and by the House, id., at 13242-13257, and was signed into law on May 13, 1977.]

Justice Powell's opinion similarly recognized that it was a purpose of the set-aside program to help "develop" minority business. Quoting Congressman Mitchell's description of his proposal, Justice Powell observed:

> He described his proposal as "the only sensible way for us to begin to develop a viable economic system for minorities in this country, with the ultimate result being that we are going to eventually be able to . . . end certain programs which are merely support survival programs for people which do not contribute to the economy". 123 Cong Rec 5327 (1977).

448 U.S. at 504.

Regarding the reasonableness of the 10% set-aside figure, Justice Powell plainly rejected the view that the set-aside had to be exactly related to the percentage of minority businesses already in existence.

> Only 4% of contractors are members of minority groups. see Fullilove v. Kreps, 584 F2d 600, 608 (1978), although minority group members constitute about 17% of the national population, see Constructors Association of Western Pennsylvania v. Kreps, 441 FSupp 936, 951 (WD Pa 1977), aff'd, 573 F2d 811 (CA3 1978). The choice of a 10% set-aside thus falls roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation.

448 U.S. at 513-14.

Implicit in the Congressional approval of the Minority Business Enterprise Amendment as well as this Court's sustaining of that measure, is an understanding of the economic consequences

of generations of invidious discrimination.

> Although the Act recites no preambulary "findings" on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment.

448 U.S. at 478.(Berger, C.J.).

The ultimate goal of such programs is the achievement of an economic equilibrium in which the percentage of minority

businesses is roughly equal to the percentage of minorities in the population. Since we have not yet reached that economic equilibrium, to limit the goals of the setaside programs to the number of existing minority businesses, would mean locking in a structure of inequality.[37] Therefore, the goals must be set so as to offset this imbalance, and move toward providing a fair share of the business opportunities available to the minority community.

> The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin. But in our quest to achieve a society free from

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37 As noted by the dissent below, the result of the Fourth Circuit's analysis is "a proof scheme . . . [that] would ensure the continuation of a systemic fait accompli, perpetuating a qualified minority contractor pool that approximates two-thirds of one percent of the overall contractor pool". (footnote omitted) 822 F.2d 1355, 1365 (4th Cir. 1987).

> racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination.

448 U.S. at 516, (Powell, J.).

No less than Congress, State and local governments have a right and a responsibility to cure the effects and prevent the perpetuation of discrimination, particularly where public actions intersect with private enterprise. Indeed this Court has consistently recognized the power of the States to prohibit discrimination by private parties and to remedy the effects of such discrimination.

> A contrary position would conflict with the traditional understanding recognizing the competence of the States to initiate measures consistent with federal policy in the absence of congressional pre-emption of the subject matter. Nothing whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Act even remotely suggests that the States are

> foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed. Indeed, voluntary initiatives by the States to achieve the national goal of equal opportunity have been recognized to be essential to its attainment.

University of California Regents v. Bakke, 438 U.S. 265, 368 (1978)(Brennan, White, Marshall and Blackmun, JJ.)(Concurring in part and dissenting in part).

In Railway Mail Assn. v. Corsi, 326 U.S. 88 (1945), this Court established the principle that a state could voluntarily exceed the requirements of the Fourteenth Amendment in eliminating private racial discrimination. Concurring in that judgment, Justice Frankfurter plainly stated the rationale for that holding.

> To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment.

Id. at 98.

CONCLUSION

For the above reasons the decision of the court of appeals should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

—v.—

J. A. CROSON COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF VIRGINIA, AND THE ACLU OF NORTHERN CALIFORNIA IN SUPPORT OF APPELLANT

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INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Northern California and the ACLU of Virginia are two of its statewide affiliates.

This case involves a constitutional challenge to a remedial program adopted by the City of Richmond to provide employment opportunities for minority-owned businesses. Because the ACLU believes such programs are not only permissible, but indispensable, if the nation is to fulfill the promise of equality contained in the Fourteenth Amendment, we submit this brief in support of petitioners and urge this Court to reverse the decision below.

SUMMARY OF ARGUMENT

This Court has yet to decide the proper constitutional analysis applicable to voluntary race-conscious affirmative action programs. In our view, such programs should be subject to intermediate scrutiny rather than the strict scrutiny applied in reviewing statutory schemes that reflect an invidious intent.

As this Court has repeatedly recognized, efforts to remedy past discrimination must often employ race-conscious criteria. E.g., Fullilove v. Klutznick, 448 U.S. 448, 482 (1980). "Any other approach would freeze the status quo that is the very target of all desegregation processes." McDaniel v. Barresi, 402 U.S. 39, 41 (1971).

Applying strict scrutiny to locally-enacted affirmative action plans would turn

the Equal Protection Clause on its head, barring local governments from voluntarily and effectively responding to persistent racial disparities within their communities. It also produces the paradoxical result that affirmative action plans designed to assist those "discrete and insular minorities" who have suffered the greatest discrimination are most vulnerable to attack.

In addition, the decision below perverts basic notions of federalism. After Fullilove, the federal government may require localities to adopt a minority set-aside program as a condition of a federal grant. Yet, when the same locality adopts the same set-aside program without federal funding, it risks running afoul of the decision below.

Finally, the decision below misinterprets the holding of Wygant v. Jackson Board of Education, 476 U.S. 267 (1986). Nothing in Wygant bars a locality from adopting a minority set-aside program in response to clear evidence that public construction contracts were not being awarded to minority businesses. Indeed, Wygant approvingly cites the federal set-aside program upheld in Fullilove, which served as a model for Richmond's plan in this case.

ARGUMENT

I. THE COURT SHOULD APPLY INTERMEDIATE SCRUTINY IN EVALUATING RICHMOND'S MINORITY SET-ASIDE PROGRAM

A majority of this Court has not yet agreed on the standard of review when affirmative action plans are challenged as racially discriminatory under the equal

protection clause. Several Justices have utilized the so-called intermediate standard applied to gender discrimination cases; i.e., the plan "must serve important governmental objectives and must be substantially related to achievement of those objectives."[1] Other Members of the Court have applied strict srutiny, requiring the government to show that its program is narrowly tailored to serve a compelling interest.[2]

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[1] Regents of the University of California v. Bakke, 438 U.S. 265, 359 (1977)(Brennan, White, Marshall, and Blackmun, JJ.); Fullilove v. Klutznick, 448 U.S. at 519 (Brennan, Marshall, and Blackmun, JJ.).

[2] Bakke, 438 U.S. at 306 (Powell, J.); Fullilove, 448 U.S. at 496 (Powell, J.); Wygant, 476 U.S. at 273 (Powell, Burger, Rehnquist, and O'Connor, JJ.) Even the definition of strict scrutiny as applied to affirmative action has defied clear standards. In Bakke, Justice Powell referred to the need for a "substantial"

(continued...)

We recognize, of course, that these distinctions are fine ones. Nevertheless, they have important substantive consequences in constitutional adjudication. They also have symbolic importance. Simply put, efforts to assist traditionally disadvantaged and historically oppressed minorities should not be treated with the same judicial skepticism as efforts to perpetuate the stigma of inferiority that the Civil War amendments were designed to eliminate.

A. Applying Strict Scrutiny In This Case Would Turn The Equal Protection Clause On Its Head

The "pervading purpose" of the Fourteenth Amendment was to eliminate the oppression of historically subjugated

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[2](...continued)
interest. 438 U.S. at 306. In Wygant, he would have required a "compelling" governmental interest. 476 U.S. at 273.

minorities and to provide them with "equality of economic opportunity." Fullilove, 448 U.S. at 489. See also The Slaughterhouse Cases, 83 U.S. (16 Wall) 36, 69 (1872). A properly drawn affirmative action plan is not inconsistent with these purposes. To the contrary, it promotes them.

This relationship was well understood by the Thirty-Ninth Congress, which proposed the Fourteenth Amendment. At the same time, it also enacted a series of measures to aid the newly freed slaves, including creation of the Freedman's Bureau, special assistance for black servicemen, and special relief to blacks in the District of Columbia.[3] Then, as now,

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[3] See generally Schnapper, "Affirmative Action and the Legislative History of the Fourteenth Amendment," 71 Va.L.Rev. 753 (1985).

those programs were challenged as preferential to blacks.[4] One of the purposes of the Fourteenth Amendment, however, was to answer those objections.[5]

The argument that affirmative action and invidious discrimination must be treated equivalently under the Fourteenth Amendment is historically insupportable. It is also logically perverse. As this Court observed in rejecting the claim that voluntary affirmative action plans were barred by Title VII:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," constituted the first legislative prohibition of

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4 Id. at 763.

5 See J. TenBroek, Equality Under Law 201 (1965).

> all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Steelworkers v. Weber, 443 U.S. 193, 204 (1979)(citation omitted).

Using the strict scrutiny standard of the equal protection clause to review affirmative action plans represents an even greater irony, whose consequences are both far-reaching and not amenable to legislative response.

B. Applying Strict Scrutiny In This Case Would Subvert The Rationale of the Suspect Classification Doctrine

There is no "fundamental right" to contract with the City of Richmond, on public construction projects or otherwise. Thus, the only possible rationale for applying strict scrutiny to Richmond's set-aside program is that it is based on the "suspect" classification of race.

The statement that all racial clasifications are constitutionally "suspect" is akin to the statement that the Constitution is "color-blind." Both are useful aphorisms but neither, in fact, accurately reflects the inescapable complexity of consitutional principle. This Court has specifically rejected the notion, on several occasions, that remedial programs must be "color-blind." E.g., Fullilove, 448 U.S. at 482; Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).[6] Likewise, racial

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[6] The reference to a "color-blind" Constitution derives, of course, from Justice Harlan's famous dissent in Plessy v. Ferguson, 163 U.S. 537 (1896). Read in context, however, it is clear that Justice Harlan's objection to racial classifications was based on his view that the Constitution forbid legislation that assumed that "colored citizens are . . . inferior," and that imposed upon them "a badge of servitude." Id. at 560, 562. Affirmative action plans, like Richmond's, (continued...)

classifications are more or less "suspect" depending on the purpose for which they are developed and the characteristics of the disadvantaged group.

The designation of certain "discrete and insular" minorities as "suspect" classes is conceptually linked to this Court's perception that such minorities operate at a disadvantage within the political system for a host of reasons that have nothing to do with their innate abilities. United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

Those concerns do not apply when, as here, a law is challenged by members of the political majority who have not been "subjected to such a history of purposeful

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[6](...continued)
proceed on very different assumptions and have very different goals.

unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973). See also Hernandez v. Texas, 347 U.S. 475 (1954).[7]

---

[7] The fact that racial minorities may constitute 50% of the general population in some cities, as they do in Richmond, does not automotically render whites a "discrete and insular minority" invoking suspect classification analysis. Mere numerical majority does not translate automatically into political domination. See Castaneda v. Partida, 430 U.S. 482, 530 (1977); United Jewish Organizations v. Carey, 430 U.S. 144, 164 (1977). The political strength of an identifiable group depends, inter alia, on voting registration rates, political cohesiveness and organization, and, of course, economic resources. See generally, Buckley v. Valeo, 424 U.S. 1 (1976)(per curiam). Moreover, the fact that a local minority constitutes a dominant group in the larger society is relevant: their political vulnerability is mitigated by the potential availability of remediation and protection at the state or

(continued...)

"Discrete and insular"-minorities also struggle with a unique badge of inferiority imposed on them by history. Recognizing that fact, this Court upheld racial segregation in the public schools not for the sake of "color-blindness" itself, but because segregation generated

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[7](...continued)
federal level.

The decision below utilized the population statistics in Richmond to suggest that the set-aside program might not be remedial at all but merely the "bald dispensation[] of public funds and employment based on the politics of race." 822 F.2d at 1358. That concern is unsupported by the record, which shows that minority businesses had received less than 1% of the dollar value of all public contracts awarded in Richmond. Moreover, intermediate scrutiny is adequate to protect against the sort of racial politics feared by the Fourth Circuit. As framed by Justice Brennan in Bakke, it requires a "sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities." 438 U.S. at 362.

among blacks "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . ." Brown v. Board of Education, 347 U.S. 483, 495 (1954). Likewise, the anti-miscengenation laws were struck down because they represented "an obvious endorsement of white supremacy." Loving v. Virginia, 388 U.S. 1, 11 (1967)(footnote omitted).

Laws that perpetuate a sense of racial inferiority are neither the legal nor moral equivalent of laws designed to relieve it. There is no reason, therefore, for this Court to subject them to the same level of review under the equal protection clause.

It would be disingenous to pretend that affirmative action plans have not been controversial. But it is fair to say that such plans do not, by and large, "reflect

prejudice and antipathy -- a view that those in the burdened class are not as worthy or deserving as others." Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). Surely, that difference has constitutional significance that this Court should acknowledge in applying the equal protection clause. Cf. Washington v. Davis, 426 U.S. 229 (1975).[8]

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[8] As Justice Stevens noted in Wygant, 476 U.S. at 316:

> There is . . . a critical difference between a decision to exclude a member of a minority race because of his or her skin color and a decision to include more members of the minority in a school faculty for that reason.
>
> The exclusionary decision rests on the false premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society . . . . The inclusionary decision is consistent with the

(continued...)

C. Applying Strict Scrutiny In This Case Creates An Illogical Paradox Under Equal Protection Law

The automatic assumption that all racial classifications must be judged by one standard under the equal protection clause -- whether their purpose is benign or invidious -- creates an intolerable paradox. Because of the rigors of strict judicial scrutiny, government is least able to help those groups that have historically suffered the greatest discrimination. By contrast, groups that are not deemed "suspect" for constitutional purposes, are more likely to receive the government's aid.

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[8](...continued)
principle that all men are created equal; the exclusionary decision is at war with that principle. One decision accords with the Equal Protection Clause of the Fourteenth Amendment; the other does not.

This paradox was realized in Associated General Contractors of California, Inc. v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987) (petition for rehearing and suggestion of rehearing en banc pending). The Ninth Circuit in that case upheld a portion of San Francisco's ordinance setting aside a percentage of city contracts to women-owned businesses but struck down a similar provision relating to minority-owned businesses. The perverse outcome resulted from the court's application of the intermediate scrutiny to the Women Business Enterprise provision, and strict scrutiny to the Minority Business Enterprise provision. It is hard to conceive how this result could possibly further the historical purposes of the Fourteenth Amendment.

II. THE DECISION BELOW MISINTERPRETS THIS COURT'S HOLDING IN WYGANT

The affirmative action plan in Wygant was struck down by this Court on three principal grounds. First, it involved layoffs rather than hiring or promotion. Second, it was not conceived as a remedy for past discrimination against non-white teachers; instead, it was justified by reference to society's generally discriminatory attitude toward non-whites and the corresponding need to provide non-white students with role models. Third, it was developed by the school board itself and not by a legislative body with plenary power.

None of these objections applies to the Richmond plan at issue in this case. To the contrary, that plan is essentially indistiguishable from the federal set-aside program upheld in Fullilove.

A. The Special Burden Of A Layoff Plan

This Court has consistently treated preferential layoff schemes differently than other affirmative action programs. See e.g., Firefighters v. Stotts, 467 U.S. 561 (1984). The reason for that difference was explained in Wygant: "While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." 476 U.S. at 283 (footnote omitted).

By contrast, a minority set-aside program does not violate any vested rights, nor disrupt any "settled expectations," nor is it likely to produce the psychological dislocation associated with "[e]ven a

temporary layoff." Id.[9] Under the Richmond plan, for example, the 30% set aside applies only to subcontract dollars; white contractors are not excluded from any portion of the city's primary contracts. They are eligible, as well, for a substantial majority (70%) of the subcontract dollars. Cf. U.S. v. Paradise, 480 U.S. ___, 107 S.Ct. 1053 (1987)(approving court ordered one-to-one ratio in promotions); Steelworkers v. Weber, 443 U.S. 193 (1979)(approving 50% hiring ratio). And they can participate in the 30% set-aside through joint ventures or 49% ownership of minority business enterprises. See South Florida Chapter v.

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[9] For the same reasons, the need for strict scrutiny is significantly less in this case than it might have been in Wygant. See Point I, supra.

Metropolitan Dade County, 723 F.2d 846, 856, n.15 (11th Cir. 1984).

Moreover, the plan does not affect the ability of white contractors to compete for private contracts and other public contracts. Cf. Fullilove, 448 U.S. at 514-515 (Powell, J.)(10% federal set-aside constituted only .25% of all funds expended yearly on construction work in the United States). It has a relatively brief duration of only five years, contains waiver provisions which parallel those approved in Fullilove, and sets a percentage level "roughly halfway between the present percentage of minority contractors and percentage of minority group members." Fullilove, 448 U.S. at 513-514 (Powell, J.).

Obviously, there is a burden attached to any affirmative action plan in the sense

that it involves a redistribution of resources. Yet here, as in Fullilove, the "actual burden shouldered by nonminority firms is relatively light." Id. at 484 (footnote omitted). If that burden is now deemed too great for the Constitution to bear, then affirmative action plans throughout the country are in jeopardy. Nothing in Wygant compels that result.

B. Wygant's Reference to Societal Discrimination Does Not Apply To The Facts Of This Case

This Court's statement in Wygant that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," 476 U.S. at 276 (emphasis added), must be understood in context. It appears in the midst of a discussion by the Court of the "role model" theory offered by the school board as the basis for its layoff plan.

The Court perceived two problems with the school board's approach in Wygant. It had "no logical stopping point . . . [and] allow[ed] the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose." Id. at 275. In addition, it might actually frustrate efforts to remedy prior discrimination "by justifying the small percentage of black teachers by reference to the small percentage of black students." Id. at 276.

The reference to "societal discrimination" became a shorthand way of expressing the notion that the rationale for the layoff plan had only a tangential relationship to the population of teachers most affected by its implementation. In classic constitutional terms, there was an inadequate fit between means and ends. To

remedy one problem -- the absence of role models -- the school board created another problem -- the loss of seniority benefits. It was this incongruity that the Court was unwilling to accept.

The Richmond set-aside plan is entirely different in both its scope and motivation. Unlike Wygant, it does not require year-by-year calibration. Id. at 275. More importantly, it does not suffer the lack of focus that so disturbed the Court in Wygant. Based on the evidence before it, the Richmond City Council was understandably concerned that minority businesses had never been given a fair opportunity to compete for construction contracts. In response, they adopted a plan designed to remedy this specific denial of equal economic opportunity. See Fullilove, 448 U.S. at 489. In short, the

nexus that was absent in Wygant -- and that prompted the Court's comment about societal discrimination -- is fully present here.[10]

Moreover, the concerns of the City Council are amply supported by the record. Contrary to the assertion of the majority below, the City Council did not "rest on broad-brush assumptions of historical discrimination." 822 F.2d at 1357. Instead, it relied upon uncontroverted evidence that the city had awarded, and was continuing to award, an infinitesimal percentage of its construction contracts to minority businesses. Furthermore, the City Council reasonably concluded that past discrimination within the construction

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10 As in Fullilove, the 30% set-aside figure adopted by the Richmond City Council is "roughly halfway between the present percentage of minority contractors and percentage of minority group members. 448 U.S. at 513-14 (Powell, J.).

industry explained the virtual absence of minority businesses from Richmond's contract award recipients.[11]

The record thus establishes a nexus between current underrepresentation of minority owned businesses in the award by Richmond of its public contracts and identifiable racial discrimination in the construction industry. No such nexus was established between the percentage of minority teachers and students in Wygant.

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11 All three branches of the federal government have recognized the history of pervasive and universal discrimination in the construction industry. See e.g., Executive Orders Nos. 11246, 11458, 11518 and 11625; Fullilove, 448 U.S. at 456-472; Steelworkers v. Weber, 443 U.S. at 198 n.1 ("Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice"). Nothing in the record or common sense suggests that the City of Richmond, Virginia was immune from the nationwide phenomenon of race discrimination in the construction industry.

As this Court noted, that disparity is one for which "there are numerous explanations . . . many of them completely unrelated to discrimination of any kind." 476 U.S. at 276.

Summarizing the evidence developed by the City Council at its legislative hearing on the set-aside plan, the district court wrote:

> It was established at the hearing that there were enormous disparities between the percentage of construction contracts awarded to minority businesses (0.67%) and the percentage of minorities in the Richmond population (about 50%) over a five-year period from 1978 to 1983 . . . . It was further stated by a city councilman and by the city manager that there was discrimination and exclusion on the basis of race kin the construction industry. in both Richmond and the state. There were a number of representatives of contracting associations present at the hearing, none of which denied this claim -- although some of them asserted that their own organizations did not dis-

criminate on the basis of race.[12]

Significantly, the 0.67% figure for minority contracts in Richmond corresponds almost precisely with the evidence considered in Fullilove, which indicated that less than 1% of all federal procurement contracts were going to minority businesses. 448 U.S. at 459.[13]

The Fourth Circuit dismissed these findings as legally insufficient after Wygant on the spurious ground that the Richmond City Council had based its set-aside plan on "national findings," 822 F.2d at 1359-60, which were analogous to

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12 The district court's findings are set forth in Appellant's Supplemental Appendix to the Jurisdictional Statement, at 164-65 (hereinafter District Court Findings).

13 These percentages are measured in terms of the dollar amount of the contracts.

the evidence of societal discrimination rejected in Wygant as a basis for affirmative action.

In fact, the Richmond City Council did not rely only on national findings. Rather, the Council was prompted to act by a congruence between the evidence elicited at is own hearing and the congressional tesimony cited in Fullilove.[14] Moreover, the so-called "national" findings disparaged by the Fourth Circuit had direct bearing on the situation in Richmond. As Chief Justice Burger noted in Fullilove:

> [T]he House Subcommittee on SBA Oversight and Minority Enterprise . . . took "full notice" . . . of reports submitted to the Congress by the General Accounting Office and by the U.S. Commission on Civil Rights . . . The Civil Rights Commission report discussed at some length the barriers encountered by minority

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14 See District Court Findings at 165.

> businesses in gaining access to government contracting opportunities at the federal, state, and local levels.

448 U.S. at 465-67 (emphasis added). Although much of this evidence related to federal procurement, there was also "direct evidence before the Congress that this pattern of disadvantange and discrimination existed with respect to state and local construction contracting as well." Id. at 478.

In the same report, the Commission on Civil Rights found that

> State and local governments . . . spend proportionately more than the Federal Government for construction. Since a large percentage of minority firms are retail and small construction companies . . . both the volume and nature of State and local contracting should provide extensive contracting opportunities for minority [business enterprises] . . . . The Federal Government has attempted . . . to stimulate the participation of minorities in

> State and local contracting. Federal efforts, however, have not resulted in a significant increase in State and local contracting programs and awards for minorities and women.[15]

Given its finding that women and minorities were significantly underrepresented in state and local contracting, the Civil Rights Commission recommended, inter alia, that "[s]tate and local governments . . . establish special contracting programs to increase contract awards to minority and female-owned firms," and suggested that "mayors should review existing procurement laws of their jurisdictions and determine the extent to

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15 United States Commission on Civil Rights, Minorities and Women as Government Contractors 122 (May 1975).

which these laws permit the establishment of contract set-aside programs."[16]

That is exactly what the Richmond City Council did in this case. Relying on Fullilove, it adopted a remedial plan that addresses a documented problem of discrimination within its local community. As the district court found: "[T]he evidence before the City Council when it enacted the ordinance . . . confirms the Plan's remedial goals."[17] Moreover, the

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16 Id. at 139.

17 See District Court Findings at 164. This conclusion is confirmed by the testimony of the Richmond City Attorney who testified before the City Council in support of the set-aside plan:

> [T]he Supreme Court, when it approved the ten per cent minority set-aside, specifically said that the justification was that it was remedial. We've reviewed the statistics of the construction contracts, and it certainly justifies that . . . [Y]es, it is

(continued...)

plan's "remedial goals" and the evidence of past discrimination before the Richmond City Council, easily distinguish this case from Wygant.

C. Wygant's Reference To Past Discrimination By the Governmental Unit Adopting An Affirmative Action Plan Should Not Be Applied Outside The Layoff Context

The Fourth Circuit erred in striking down the Richmond set-aside plan on the ground that voluntary, race conscious, affirmative action programs initiated by a state or local legislature must be predicated on a showing of "prior discrimination by the governmental unit involved." 822 F.2d at 1358, quoting Wygant, 476 U.S. at 274 (plurality

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[17](...continued)
remedial . . . .

Hearing on Adoption of Minority Business Utilization Plan, Richmond, Virginia City Council 8 (April 11, 1983)(transcript).

opinion)(emphasis supplied in Croson).

First, there is at least as much evidence of governmental discrimination in this case as in Fullilove. Second, the cited passage from Wygant did not command a majority of the Court.[18] Third, even the plurality opinion in Wygant does not place any such limit on the remedial power of state and local legislatures, as opposed to administrative bodies lacking plenary lawmaking authority.[19]

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[18] Under intermediate scrutiny, a finding of prior discrimination is not required. Bakke, 438 U.S. at 369 (Brennan, J.); Califano v. Webster, 430 U.S. 313, 317 (1977).

[19] The Richmond City Council is authorized under Virginia law to enact the city's Business Minority Utilization Plan, and has specific institutional competence to establish policies responsive to the effects of discrimination. 779 F.2d at 184-186. Unlike the Board of Education in Wygant or the Board of Regents in Bakke whose, "broad mission is education, not the

(continued...)

Contrary to the approach of the court below, Wygant need not and should not be read as establishing an absolute rule that state and local governments cannot engage in affirmative action in their award of public contracts absent evidence of their own prior discrimination. Such a result would be inconsistent with Fullilove,

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19(...continued)
formulation of any legislative policy or adjudication of particular claims of illegality" (Bakke, 438 U.S. at 309), the Richmond City Council is not an "isolated segment" within a vast governmental structure, but the plenary law-making body of the local sovereignty with the "authority and capability to establish . . . that the classification is responsive to identified discrimination." Bakke, 438 U.S. at 309 (Powell, J,). Its authority to set broad social policy and to fashion local legislation in response to the local impact of discrimination is essentially the same as Congress' role in the federal government. See Ohio Contractors v. Keip, 713 F.2d 167, 172 (6th Cir. 1983). Cf. Fullilove, 448 U.S. at 503 n.4 (Powell, J., concurring)("a court should uphold a reasonable congressional finding of discrimination")(emphasis added).

which invalidated federal set-aside legislation without any showing that the meager participation of minority-owned businesses in federally funded public contracts was the result of prior unlawful discrimination by the federal government or any other governmental unit. Congress merely found the disparity was the result of

> barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, <u>even absent any intentional discrimination or other unlawful conduct</u>.

448 U.S. at 478 (emphasis added).

It is clear from the legislative history that the congressional decision to adopt a federal set-aside program was prompted as much by concern over discriminatory practices in the private sector as any record of past governmental discrimination. The 1977 Report of the

House Committee on Small Business, cited by the Court in Fullilove, summarized the problem Congress was addressing:

> The very basic problem disclosed by the testimony is that - over the years - there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities.

448 U.S. at 466 n.48 (citation omitted).[20]

Nothing in Fullilove even remotely suggests that its holding is limited to

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[20] The result in Fullilove is justified not only by the Fourteenth Amendment's "century-old promise of equality with opportunity," 448 U.S. at 463, but also the fact that Civil War Amendments were intended to remediate both state and private discrimination. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441-43 (1968).

congressional action. Nor would any such limitation make sense. If Congress has the power to respond to documented discrimination in a particular industry -- and to require the states to respond as a condition of receiving federal money -- then state and local legislatures must have the same power to respond to local problems without federal prodding.

To hold otherwise would totally distort the principles of federalism. As Justice Brennan observed in Bakke:

> [W]e see no reason to conclude that the States cannot voluntarily accomplish under Section 1 of the Fourteenth Amendment what Congress under Section 5 of the Fourteenth Amendment validly may authorize or compel either the States or private persons to do. A contrary position would conflict with the traditional understanding recognizing the competence of the States to initiate measures consistent with federal policy in the absence of congressional pre-emption of the

> subject matter. Nothing whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Acts even remotely suggests that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed. Indeed, voluntary initiatives by the States to achieve the national goal of equal opportunity have been recognized to be essential to its attainment.

438 U.S. at 368.[21]

Such a limitation upon the power of state and local legislatures to act in response to discrimination not of its own making would be unprecedented. This Court

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21 Nor can Fullilove be distinguished on the basis of Congress' enforcement power under Section 5 of the Fourteenth Amendment. The plurality opinion relied on Section 5 as authority only for the federal government's imposition of affirmative action on state and local governmental grantees, not for its substantive power to affect private rights. Fullilove, 448 U.S. at 476-78. See Ohio Contractors Association v. Keip, 713 F.2d 167, 172 (6th Cir. 1983).

has never doubted the power of state and local government to implement race-conscious integration of public schools in the absence of proven governmental discrimination. McDaniel v. Barresi, 402 U.S. 39, 41 (1971); Swann v. Charlotte-Mecklenberg, 401 U.S. 1, 16 (1971).

State and local governments unquestionably have had the power to correct racial imbalances resulting from de facto segregation, even where the federal courts could not have constitutionally ordered a race-conscious remedy under Dayton Board of Education v. Brinkman, 433 U.S. 406, 420 (1976). See Kromnick v. School District of Philadelphia, 739 F.2d 894, 897 (3rd Cir. 1984); Jackson v. Pasadena City School District, 59 Cal.2d 876, 881, 382 P.2d 878 (1963). Indeed, this Court has invalidated attempts to

limit such local power. Washington v. Seattle School District, 458 U.S. 457 (1982); North Carolina State Board of Education v. Swann, 402 U.S. 43, 45 (1971).

The power of state and local governments to engage in race-conscious remediation despite the lack of any evidence of direct governmental culpability has been upheld in other contexts as well. United Jewish Organizations v. Carey, 430 U.S. 144, 157 (1977); South Florida Chapter v. Metropolitan Dade County, 723 F.2d 846, 853 (11th Cir. 1984).

Restricting a local government to the narrow remedial purpose of redressing only its unlawful discrimination would drastically and unnecessarily limit governmental efforts to "effectuate the constitutional mandate for equality of economic opportunity." Fullilove, 448 U.S.

at 489. Moreover, "[a] requirement that an employer actually prove that it had discriminated in the past would . . . unduly discourage voluntary efforts to remedy discrimination." Johnson v. Santa Clara Transportation Agency, ___ U.S. ___, 107 S.Ct. 1442, 1463 (1987)(O'Connor, J., concurring).[22]

Under the panel's interpretation of Wygant, local legislatures would be powerless to remedy the lingering effects of pervasive, identifiable, and even proven race discrimination in the private sector absent substantial evidence that the

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22 See also Sullivan, Supreme Court Forward: "Sins of Discrimination - Last Term's Affirmative Action Cases," 100 Harv.L.Rev. 78, 92 (1987)("even without formal findings . . . the task of self-judgment and self-condemnation in any form casts a chill over efforts to implement affirmative action voluntarily")(emphasis in original).

governmental unit involved itself discriminated. Indeed, local legislatures would be powerless to act even where it is clear that race-neutral remedies alone would not be effective.[23]

Imposing such a constitutional straitjacket on state and local legislatures would have the ultimate effect of perpetuating historical patterns of discrimination. Under the panel's ruling in this case, the government could not engage in affirmative action, even under the more generous "arguable violation" standard, unless it first established a

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23 Cf. Local 28 of Sheet Metal Workers' Intern. Ass'n v. E.E.O.C., 478 U.S. ___, 106 S.Ct. 3019, 3051 (1986)(affirmative action may be necessary to dissipate the lingering effects of pervasive discrimination, such as where union's reputation for discrimination operated to discourage minorities from even applying for membership).

statistical disparity between the percentage of minorities selected and percentage of minorities in the relevant pool. See Johnson, 107 S.Ct. at 1462-65, (O'Connor, J., concurring); Wygant, 476 U.S. at 292 (O'Connor, J., concurring). Where minorities have been excluded from the relevant pool as a result of prior discrimination, tying the permissible units of affirmative action to the composition of the pool would lock the locality into perpetuating the existing disparity:

> a proof scheme requiring a comparison of the percentage of contracts awarded with this small qualified pool of minority contractors would ensure the continuation of a systemic fait accompli, perpetuating a qualified minority contractor pool that approximates two-third of one percent of the overall contractor pool . . . . Common sense dictates that judging the set-aside by referring to the small proportion of existing MBE's in the economy would

> perpetuate rather than alleviate past discrimination.

822 F.2d at 1365, 1367 (Sprouse, J., dissenting).

Moreover, such a requirement creates a "gross anomaly" that the greater the effectiveness of historical non-governmental discrimination in excluding minorities from the relevant pool, the less room local legislatures have to act: "truly pernicious discrimination could have the compound effect of blocking remedial action." Id. at 1365 n.11 (Sprouse, J., dissenting). Certainly, such a perverse result is not countenanced by the equal protection clause, and Wygant should not be read as dictating such a result.

The panel majority below justified its interpretation of Wygant by reasoning that absent a particularized showing of past governmental discrimination, the

government's motive for establishing an affirmative action program is necessarily suspect. 822 F.2d at 1358. It is simply irrational to presume, as did the panel below, that an affirmative action program not predicated on a particularized showing of past governmental discrimination represents "an abuse of the political process rather than remedial action." 779 F.2d at 203 (Wilkinson, J., dissenting).

An affirmative action program may be implemented for a variety of legitimate reasons, such as eliminating a "work force imbalances in traditionally segregated job categories." Johnson, 107 S.Ct. 1442, 1455 (O'Connor, J., concurring). Moreover, a program may be established for legitimate "forward-looking considerations". See id. at 1460 (Stevens, J., concurring).

In addition to the goal of redressing the effects of identifiable discrimination in the construction industry, representative bodies such as the Richmond City Council have a particularly compelling interest in taking affirmative steps to avoid perpetuating racial disparities in the conduct of its business. The net effect of awarding public contracts to the near total exclusion of minority-owned businesses is to redistribute public moneys from economically disadvantaged blacks (who pay taxes like everyone else) to historically advantaged whites. This exacerbation of the malapportionment of economic resources perpetuates the fact and perception of unfairness and destroys community trust in the government. Williams v. Virkovich, 720 F.2d 909, 923-

924 (6th Cir. 1983). The "'exclusion of minorities from effective participation . . . . creates mistrust, alienation, and all too often hostility toward the entire process of government.'" Wygant, 476 U.S. at 290 (O'Connor, J., concurring), quoting S. Rep. No. 415, 92d Cong., 1st Sess. 10 (1971).

Richmond also had a substantial interest in removing barriers to competition in the construction industry caused by the prior exclusion of minorities therefrom. By taking immediate steps to facilitate the competiteveness and experience of minority businesses under the Minority Business Utilization Plan, the City will, in the long run, enhance the overall competitiveness of the construction industry and hence the efficiency of its bidding process. See 779 F.2d at 185.

Moreover, like Congress' set-aside legislation, the effect of the Plan was to "direct funds into the minority business community, a sector of the economy sorely in need of economic stimulus." Fullilove, 448 U.S. at 459.

The severe limitation placed on permissible affirmative action by the panel --restricting race-specific set-asides to remedying Richmond's own prior discrimination -- is supported by neither logic,[24] policy, nor previous decisions of

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[24] From the perspective of non-minority contractors who bear the burden of the set-aside, it matters little whether the governmental unit involved engaged in past discrimination. Their burden is the same. See Bakke, 438 U.S. at 365 (Brennan, J.). Cf. Franks v. Bowman Transportation, 474 U.S. 747 (1976).

Where current disparities are attributable to past identifiable discrimination, be it private or public discrimination, non-minority businesses "may have reaped competitive benefit over the years from the

(continued...)

this Court. See Bakke, 438 U.S. at (medical school affirmative action admissions policy justified by diversity of student body); Paradise, 107 S.Ct. at 1065 n.18 (affirmative action in hiring of law enforcement personnel may be justified by its restoration of "community trust in the fairness of law enforcement" and facilitation of effective police service in encouraging citizen cooperation); Wygant, 476 U.S. at 286 (O'Connor, J., concurring) (opinion does not foreclose possibility that "other governmental interests which have been relied upon in the lower courts

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[24](...continued)
virtual exclusion of minority firms" from contracting opportunities." Fullilove, 448 U.S. at 485 (Burger, Ch.J.). See also Bakke, 438 U.S. at 365-66 (Brennan, J.). Hence, affirmative action has an equitable basis where there are continuing effects of prior discrimination regardless of whether the discrimination was private, governmental, or both.

but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies").

In the words of one noted commentator: "[T]he federal government alone cannot be expected to eradicate racial discrimination in America. Public institutions at all levels must contribute to the effort. They are often in a better position to . . . tailor corrective programs than is Congress. They should not be disqualified from this endeavor." Days, Fullilove, 96 Yale L.J. 453, 478 (1987).

CONCLUSION

For the reasons stated herein, the decision below should be reversed.

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No. 87-998

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CITY OF RICHMOND,
Appellant,

VS.

J.A. CROSON COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

BRIEF OF ALPHA KAPPA ALPHA SORORITY; COALITION FOR CIVIL RIGHTS; COALITION FOR ECONOMIC EQUITY; COUNCIL OF ASIAN-AMERICAN BUSINESS ASSOCIATION; GOLDEN GATE SECTION OF THE SOCIETY OF WOMEN ENGINEERS; HISPANIC CHAMBER OF COMMERCE, SAN FRANCISCO; KAPPA ALPHA PSI FRATERNITY; NATIONAL BAR ASSOCIATION; SAN FRANCISCO BLACK CHAMBER OF COMMERCE; WESTERN REGION-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP); AILEEN HERNANDEZ ASSOCIATES; AMERICAN PROPERTY EXCHANGE; CASA SANCHEZ; CORY GIN, ASSOCIATES; INTERSTATE PARKING COMPANY, INC.; JEAN PIERRE AND COMPANY; JEFFERSON AND ASSOCIATES; McCLAIN AND WOO; NAOMI GRAY ASSOCIATES, INC.; PEGASUS ENGINEERING, INC.; SELWYN WHITEHEAD ENTERPRISES AS AMICI CURIAE IN SUPPORT OF APPELLANT.

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No. 87-998

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CITY OF RICHMOND,
Appellant,

v.

J.A. CROSON COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

BRIEF OF ALPHA KAPPA ALPHA SORORITY; COALITION FOR CIVIL RIGHTS; COALITION FOR ECONOMIC EQUITY; COUNCIL OF ASIAN-AMERICAN BUSINESS ASSOCIATION; GOLDEN GATE SECTION OF THE SOCIETY OF WOMEN ENGINEERS; HISPANIC CHAMBER OF COMMERCE, SAN FRANCISCO; KAPPA ALPHA PSI FRATERNITY; NATIONAL BAR ASSOCIATION; SAN FRANCISCO BLACK CHAMBER OF COMMERCE; WESTERN REGION-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP); AILEEN HERNANDEZ ASSOCIATES; AMERICAN PROPERTY EXCHANGE; CASA SANCHEZ; CORY GIN, ASSOCIATES; INTERSTATE PARKING COMPANY, INC.; JEAN PIERRE AND COMPANY; JEFFERSON AND ASSOCIATES; McCLAIN AND WOO; NAOMI GRAY ASSOCIATES, INC.; PEGASUS ENGINEERING, INC.; SELWYN WHITEHEAD ENTERPRISES AS AMICI CURIAE IN SUPPORT OF APPELLANT.

CONSENT FOR FILING

This Amici Curiae brief is being filed with the consent of the parties. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

INTEREST OF THE AMICI

The common theme linking all Amici in this brief is a commitment to ensuring that the historical lock by white male contractors on receipt of contracts from municipalities throughout this nation be broken so that minority and women businesses can share in the economic benefits of these contracts which amount to billions of dollars annually.

The Amici from the San Francisco Bay Area have an especially critical concern for the outcome of this case. For the final analysis, the Court's decision here will probably announce principles which will determine the validity of a similar ordinance adopted by San Francisco which is currently pending before the Ninth Circuit Court of Appeals.

In 1984, the Board of Supervisors of San Francisco, by a 10 to 1 vote, enacted a comprehensive ordinance aimed at rectifying the discrimination and under-representation of minority business enterprises (MBE's) and women owned business enterprises (WBE's). San Francisco's ordinance was enacted after extensive testimony revealed that despite the fact that approximately 40% of the businesses in the Bay Area are owned by women and minorities, only 2.87% of the city's contracting dollars were awarded to MBE's and WBE's. As soon as San Francisco adopted its remedial ordinance, the Associated General Contractors sued to enjoin its implementation (*Associated General Contractors v. City and County of San Francisco*, 619 F. Supp. 334 (N.D. Cal.1985).)

The San Francisco ordinance, which is awaiting a decision on a motion for rehearing and suggestion for rehearing en banc, (*Associated General Contractors v. City and County of San Francisco*, 813 F. 2d 922 (9th Cir. 1987)) has been in litigation for the past 4 years and its fate in all likelihood will be determined by the

Court's decision in the instant action. Minority and female vendors, as the real parties in interest in any litigation involving race and gender conscious government contractings, have the unique vantage point possessed by MBE's and WBE's which should be taken into account when the Court decides these admittedly thorny issues of grave constitutional import. Since the primary legal support for race and gender conscious programs enacted to end discrimination will come from the very governmental agencies which have for years excluded people of color and women from contracting opportunities through overt and institutional discrimination, the Amici who have suffered years of discrimination and under-representation in receiving contracts from municipalities, believe it is critical that the Court consider their views in this matter.

Many of the Amici herein represent San Francisco's rich ethnic diversity. Women, Asians, Hispanics, Blacks and whites, who are committed to the full desegregation of society, join together to urge this Court to reverse the opinion of the Fourth Circuit.

Finally, many of the Amici in this action are minority and women owned businesses who currently contract with the City and County of San Francisco, California. The other Amici are civil rights and service organizations which have a keen interest in the preservation and extension of race and gender conscious programs designed to remedy past discrimination and the under-representation of minorities and women in the award of government contracts. Specifically the Amici and their interests are as follows:

Membership Organizations

Alpha Kappa Alpha Sorority, Inc. is a national Greek-lettered organization which is comprised of over 100,000 members in more than 725 undergraduate and graduate chapters. In 1908, the Sorority became the country's first Greek-lettered organization which was established by and for Black women. Since its incorporation in 1913, the Sorority has developed into a vehicle by which Black college-trained women have improved and impacted upon the social and economic conditions in their respective cities and

states. This influence has stretched to molding policies of this nation and the world, thereby carrying out the Sorority's current theme of "Service with a Global Perspective". The affirmance of the opinion below would effect an erosion of the principles developed by *Fullilove* and would place a heavy burden upon, and effectively chill, a municipality from enacting voluntary affirmative action programs.

The Coalition for Civil Rights is a multi-racial organization based in San Francisco. Comprised of twenty-six (26) organizations representing women, Blacks, Hispanics, Asians, and whites, the Coalition fights to fully desegregate all areas of society including business and contracting.

The Coalition for Economic Equity is an organization comprised of whites, Blacks, Hispanics, Asians, men, and women who are committed to increasing the percentage of contracting dollars awarded to minority and women owned businesses in San Francisco, The Coalition was active in gaining passage of a minority and women enterprises ordinance in the City and County of San Francisco in 1984.

The Council of Asian American Business Association consists of four trade associations: Asian American Architects and Engineers, Asian Business Association, Association of Asian Certified Public Accountants and the United Asian Contractors Association totalling approximately 300 firms located in the San Francisco Bay Area. The goal of the Association is to promote business opportunities for Asian American entrepreneurs.

The Golden Gate Section of the Society of Women Engineers, founded in 1949, is the local chapter of the National Society of Women Engineers. The local chapter is 15 years old and has a membership of over 100 women. The purpose of the organization is to counsel and encourage women to enter the engineering profession.

The Hispanic Chamber of Commerce is a membership organization comprised of businesses located in San Francisco. The chamber reflects the make-up of the Hispanic community.

Kappa Alpha Psi Fraternity is an organization of some 80,000 Black men concerned with all aspects of minority affairs in this country. Long active in struggles aimed at improving the lot, economic and otherwise, of Black Americans, Kappa Alpha Psi believes that the future of minority contracting programs, which have been instituted by a number of municipalities around the nation, is directly imperiled by the decision of the Fourth Circuit Court of Appeals.

The National Bar Association, founded in 1925, is a professional membership organization which represents more than 12,000 Black attorneys, judges and law students in the United States. Its purposes include achieving equal opportunities for minorities in the legal profession and protecting the civil and political rights of all citizens. The Association has a particular interest in this case because of its belief in the importance of affirmative action as a means of solving America's racial problems.

The San Francisco Black Chamber of Commerce is an organization of over 100 businesses and individuals devoted to the development and advancement of Black entrepreneurs. It has sought to increase opportunities for minority-owned firms and supported the passage of the city ordinance to eliminate underrepresentation of minority firms in business contracting with the city.

The Western Region of the National Association for the Advancement of Colored People (NAACP), is the regional administrative headquarters of the NAACP. The NAACP, the oldest civil rights organization in the United States, believes that affirmative action programs are essential means of redressing discrimination against people of color by both private and public entities.

Private Businesses

Aileen Hernandez Associates is a consulting firm owned and operated by Black women. The types of services it provides to the City and County of San Francisco include research, training and

development techniques for public participation and public relations.

American Property Exchange is a real estate investment firm in San Francisco which is owned by a white woman.

Casa Sanchez is an Hispanic owned food manufacturing company located in San Francisco.

Cory Gin Associates is an Asian-owned architectural/design firm located in San Francisco.

Interstate Parking Company, Inc. is a Black-owned San Francisco business that has contracted with the city for parking concessions and is a registered Minority Business Enterprise.

Jean Pierre & Co. is a Black-owned certified public accountancy firm that has done business with the city and is a registered Minority Business Enterprise in San Francisco.

Jefferson Associates is a Black-owned development, planning and architectural firm which contracts with the city. It is a registered Minority Business Enterprise in San Francisco.

McClain and Woo, CPA, is an Asian auditing firm located in San Francisco.

Naomi Gray Associates, Inc. is a consulting firm owned and operated by a Black woman. The services provided include management and health related issues.

Pegasus Engineering, Inc. is a structural engineering consulting firm owned and operated by a white woman.

Selwyn Whitehead Enterprises is a business owned by a Black woman which designs computer networks, training programs in telephony and sells date communications hardware.

SUMMARY OF ARGUMENT

The decision of the Fourth Circuit that Richmond's ordinance, "prefers some, and in so doing diminishes the rights of all" (*Croson v. City of Richmond*, 822 F.2d 1355, 1362 (4th Cir. 1987) decimates the endeavors of numerous cities across this nation to eradicate the present effects of prior discrimination.

Today, the inability of minorities to compete with white contractors for municipal contracts is the tragic, but inevitable result of years of their unequal treatment and actual exclusion from the contracting process. Not only have minorities been excluded by government officials, but also by white male firms who now seek to protect the huge benefits they have reaped as a result of that exclusion. Although the Fourth Circuit contends that the "record of prior discrimination supporting the Richmond plan is deficient" (822 F.2d at 1360), the inescapable fact is that until the middle of the 20th century, segregation of Blacks was enforced by law. (See, *Brown v. Board of Education*, 347 U.S. 483 (1954); see also, Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987).)

While Blacks were prevented from participating in the economic prosperity of this nation, white contractors were given a virtual monopoly on government contracts. As Blacks fought desperately to emerge from legally sanctioned segregation (see, e.g., *Morgan v. Virginia*, 328 U.S. 373 (1946); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950)), white contractors were steadily building their firms with government contracts thereby cementing their hold on those contracts. By the time legal segregation of Blacks ended, white contractors had firmly established their monopoly on government contracts.

This Court, as it struggles to fashion an analysis of affirmative action programs, under the Equal Protection Clause, should not, and indeed cannot, ignore "the sorry history of discrimination and its devastating impact on the lives of [Blacks]." (*University of California Regents v. Bakke*, 438 U.S. 265, 396 (1978), Marshall J., dissenting). Moreover, it must also remember "that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of [Blacks]." (*Id.* at 396-397).

The record below substantiates that the Richmond City Council had ample evidence of the virtual exclusion of Blacks and others from receiving city contracts. Moreover, not only was the City Council aware of the City's history of prior discrimination, but it was equally mindful of its responsibility to take affirmative

steps to remedy the devastating effects of that discrimination. Thus, contrary to the opinion of the Fourth Circuit, the Fourteenth Amendment commands, rather than condemns, Richmond's affirmative steps to remedy the exclusion of minorities and others from city contracting.

ARGUMENT

I

MUNICIPALITIES HAVE A COMPELLING INTEREST IN IMPLEMENTING AFFIRMATIVE ACTION PROGRAMS TO REMEDY THE PRESENT EFFECTS OF PAST DISCRIMINATION

A. Richmond had a compelling interest for enacting its ordinance

The existence of discrimination in Richmond's construction industry was carefully considered by the City Council. The City Council determined that the present effects of prior discrimination were so egregious and pervasive that remedial governmental action was necessary to reverse the virtual exclusion of minorities from receiving city contracts. Aware that traditional contracting procedures would not correct the problem, the City Council concluded, as this Court concluded in *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980), "That traditional procurement practices, when applied to minorities' businesses, could perpetuate the effects of prior discrimination." Accordingly, Richmond, acknowledging that continued reliance upon traditional procurement practices would not remedy the undisputed fact that white-owned firms receive 99 percent of the City's construction business, took affirmative measures to correct this unfair advantage enjoyed by white firms.

In 1983, one-half of the population of Richmond was Black, but in the five years prior to 1983 less than one percent of the City's $124 million in construction contracts was awarded to minority-owned businesses. These facts, *inter alia*, convinced both the City Council and the district court that the exclusion of minorities from city construction contracts was due to racial

discrimination in the construction industry. Thus, race conscious affirmative action programs are appropriate to eradicate the effects of such discrimination. As Justice Powell astutely observed in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 280-281 (1986) "in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." *Wygant*, a plurality opinion, involved a challenge to a preferential layoff provision in a collective bargaining agreement for school teachers.

The remedy selected by Richmond, similar to that selected by other cities, is designed only to eliminate the present effects of practices that have developed over many years of awarding contracts which have excluded minority firms, while favoring white firms. Using race conscious efforts to remedy such prior discriminatory practices, does not violate the Equal Protection Clause. For this Court, in *United States v. Paradise*, ____ U.S. ____, 107 S.Ct. 1053, 1064 (1987), which upheld race conscious relief where there was a history of discrimination, recognized that: "It is now well established that government bodies . . . . may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination". This is precisely what Richmond did to correct past racial discrimination which allowed white firms to receive 99 percent of Richmond's construction contracts. Richmond's interest in remedying this injustice was not only compelling, but essential in order to maintain the integrity of the City's contracting process.

B. San Francisco, as well as other cities around the nation, has a compelling interest in implementing voluntary affirmative action programs

1. San Francisco's ordinance which requires affirmative action in city contracting will be severely impaired unless the decision below is reversed

On April 2, 1984, San Francisco enacted the Minority/Women/Local Business Utilization ordinance. This ordinance

was the culmination of a long effort to increase the participation of minority and women business enterprises in municipal contracting. It was indeed a voluntary effort by San Francisco to remedy the present effects of past discrimination against such businesses.

The ordinance was enacted after months of public hearings where numerous people testified and presented written evidence regarding their inability to secure city contracts. After the public hearings, San Francisco, in enacting the ordinance, made the following findings:

> 1. "That historic discrimination against minorities and women, often officially sanctioned and enforced by government from the inception of our Republic to the present had a serious, negative impact on their ability to participate fully and adequately in our society; and
>
> 2. That because of centuries of limited access to the marketplace—as workers and as entrepreneurs—and because of the failure of local governmental agencies to take affirmative steps to remedy *overt* and subtle *discrimination*, women and minorities have suffered severe economic harm;" (S.F. Ord. 139-84, Ch. 12D, § 12 D2.)

Immediately, after the enactment of said ordinance, white contractors who, just as in the case at bar, had been the recipients of substantially all of San Francisco's contracts, challenged the validity of the ordinance. (See, *Associated General Contractors v. City and County of San Francisco*, 619 F. Supp. 334 (N.D. Cal. 1985).) The trial court upheld the ordinance, but on appeal a three-judge panel of the Ninth Circuit reversed, in part, holding that the race conscious aspects of the ordinance were violative of the Equal Protection Clause. (See, *Associated General Contractors v. City and County of San Francisco*, 813 F. 2d 922 (9th Cir. 1987).) A petition for rehearing with suggestion that it be en banc has been pending in the Ninth Circuit since June 1987, and the ordinance has remained in effect pending the outcome of said petition.

The Ninth Circuit, similar to the Fourth Circuit in the instant case, incorrectly relied upon *Wygant v. Jackson Board of Educa-*

tion, supra, 476 U.S. 267 to invalidate the race conscious aspects of the ordinance. As will be discussed later, *Wygant* does not support the conclusions of either the Fourth or the Ninth Circuit Courts of Appeals. But, prior to discussing *Wygant*, it is important to discuss the effectiveness of, and necessity for, affirmative action programs such as the ones adopted by Richmond and San Francisco.

2. The operation of the San Francisco ordinance has demonstrated that affirmative action programs can and do, remedy the effects of past discrimination

Affirmative action programs, like that embodied in the San Francisco ordinance, are not only necessary to remedy past discrimination, but if implemented correctly can actually decrease discrimination and increase the participation of minorities and women in the economic dream of this Nation. For example, when San Francisco commenced implementing its ordinance in 1984, minorities were receiving only 2.87 percent of the total contract dollars awarded by San Francisco. As a result of the ordinance, by 1986, that participation had climbed to 25.4 percent of the total contract dollars.[1]

Prior to implementing the ordinance, only 130 firms which qualified in 1983 as minority or women-owned businesses, were doing business with San Francisco. Because of the affirmative action endeavors of San Francisco, by 1986, 1562 such firms were receiving contracts from the city.[2] These firms are now gaining the necessary experience and capital to compete successfully with white firms for city contracts when the ordinance expires in 1989.

One fear commonly held by those who either oppose affirmative action or who are uncomfortable with its implications and implementation is that unqualified members of protected classes will be foisted upon entities which enforce affirmative action

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[1] See, *Contracting Participation Report FY 1984-1985 And FY 1985-1986*, Human Rights Commission of San Francisco (1987). Copies have been forwarded by Amici to the Clerk of the United States Supreme Court.

[2] *Id* at p.4.

programs. Another fear that exists is that affirmative action programs, particularly in the contracting area, will result in increased costs to municipalities which are already strapped for working capital. Nothing could be farther from the truth.

In San Francisco, during the 4 years that the ordinance has been in effect, these fears have failed to materialize. When no qualified MBE's nor WBE's exist to fulfill a contract, the San Francisco Human Rights Commission has granted a waiver. Between 1984 and 1986, waivers were granted 78 times. With regard to the fear of increased costs, ordinances such as that of San Francisco have actually resulted in savings of millions of dollars to municipalities. These savings result from the increased competitiveness which follows the presence of additional contractors doing business with the City. White male contractors now underbid their own historically acceptable bid levels as their way of factoring in the presence of MBE's and WBE's. Even when waivers are granted due to the lack of qualified MBE's and WBE's, contract bids are lower simply due to the presence and potential bids of MBE's and WBE's. Finally, it should be specifically noted that contrary to the fears of white contractors, they have not been impacted substantially by the enforcement of the San Francisco ordinance. In fiscal year 1985-86, they were awarded 74.6 percent of the contracting dollars expended by San Francisco.

In practice, the ordinance has provided a remedial shield for minorities giving them an opportunity to compete with white firms, while at the same time protecting the rights of white firms to continue to receive substantial contracting dollars from San Francisco. Accordingly, the reasonable expectations of white contractors have not been frustrated. (See e.g., *Johnson v. Transportation Agency, Santa Clara County*, ____ U.S. ____, 107 S. Ct. 1442, 1455 (1987). It is thus clear, as shown by the San Francisco experience, that affirmative action ordinances can, and do, remedy past discrimination while not unduly trammeling the rights of innocent white male firms. Hence, they do not offend the Equal Protection Clause. (See, *United States v. Paradise*, ____ U.S. ____, 107 S.Ct. 1053, 1064 (1987).

C. Affirmative action programs are designed to reduce the unfair advantage nonminority firms enjoy because of the exclusion of minority firms from contracting opportunities

The clear objective of government affirmative action programs is to provide an opportunity for minority firms to compete with white firms on an equal footing. To achieve this equality, it is, of course, necessary to institute programs which may occasionally require white firms to share their monopoly on public contracting with heretofore excluded minorities. Municipalities, such as Richmond and San Francisco, recognize, as has this Court, that "in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities." (*Fullilove v. Klutznick, supra*, 448 U.S. at 485). This Court, in *Fullilove*, correctly observed:

> It must be conceded that by its objective of remedying the historical impairment of access, the MBE provision can have the effect of awarding some contracts to MBE's which otherwise might be awarded to other businesses, who may themselves be innocent of any prior discriminatory actions. Failure of nonminority firms to receive certain contracts is, of course, an incidental consequence of the program, not part of its objective; similarly, past impairment of minority-firm access to public contracting opportunities may have been an incidental consequence of 'business as usual' by public contracting agencies and among prime contractors." (*Id.* at 484.)

Thus, Richmond and San Francisco, as well as other cities who are concerned with divesting white firms of the "competitive benefits" of years of "virtual exclusion of minority firms from . . . contracting opportunities" (*Fullilove v. Klutznick, supra*, 448 U.S. at 485), have a compelling interest in instituting remedial programs to place heretofore excluded minorities "on a more equitable footing with respect to public contracting opportunities." (*Id.* at 484.) Hence, the underlying principles announced in *Fullilove* are still sound today, and they should indeed apply equally to this case. This is especially true where local govern-

ments, following the example set by Congress, try to remedy years of exclusion of minorities from participating in lucrative contracts awarded by such governmental entities.

II

THE FOURTH CIRCUIT'S DECISION WOULD FORCE MUNICIPALITIES TO PERPETUATE RATHER THAN REMEDY THE PRESENT EFFECTS OF PAST DISCRIMINATION

A. *Wygant v. Jackson* does not require a city to perpetuate the present effects of past discrimination

By holding that Richmond was required to demonstrate or admit its own prior discrimination, the Fourth Circuit embarked upon a journey which inevitably leads to a freezing of the status quo. (*Croson v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987). By freezing the status quo, as done by the Fourth Circuit, the present effects of past discrimination will remain permanently embedded in the contracting process of not only Richmond, but also in countless other municipalities throughout the nation. The Fourth Circuit's reliance upon *Wygant v. Jackson, supra*, for this proposition is wholly misplaced. *Wygant* requires no such conclusion. At most, *Wygant* says, that: "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." (*Id.* at 276.) But, *Wygant* explained that:

> In particular, a public employer . . . must ensure that before it embarks on an affirmative action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination." (*Id.* at 277.)

Richmond had before it statistics showing that 99 percent of its $124 million construction contract awards were going to white-owned firms. There was ample other evidence to convince the City Council that these white owned firms were receiving this "competitive benefit" because of years of "virtual exclusion of minority firms from . . . contracting opportunities." (*Fullilove v. Klutznick supra*, 448 U.S. 485.) Thus, the *Wygant* test was met

and the evidence was not only convincing, but clearly supported the need for Richmond to take remedial action.

B. Public policy is not served by forcing municipalities to either prove or admit past discrimination before voluntarily instituting an affirmative action program

The Fourth Circuit puts cities such as Richmond in the dilemma that Justice O'Connor discussed in her concurring opinion in *Wygant*. Recognizing that no municipality, which has legal counsel, is likely to admit prior discrimination, Justice O'Connor explained how the Fourth Circuit's decision can frustrate sound public policy which favors the voluntary adoption of affirmative action programs:

> The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations. (*Wygant v. Jackson, supra,* 476 U.S. at 290, (O'Connor, J., concurring).)

Remedying, not pertpetuating the present effects of past discrimination, as would be required if the Fourth Circuit's decision is upheld, is the ultimate goal of affirmative action programs such as those voluntarily instituted by Richmond, San Francisco and other cities. This point is critical because, as Justice O'Connor notes in her concurring opinion in *Wygant*:

> The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance. (*Id.*)

Thus, the Fourth Circuit's decision militates against voluntary affirmative action. Unless reversed, the decision below will encourage municipalities to protect themselves against exposure to litigation by refusing to voluntarily remedy past discrimination for fear of having to admit prior discrimination. Such a result is not only undesirable, but would virtually assure the continued exclusion of minorities and women from effective participation in

government contracting opportunities. In the final analysis such a result would promote "ignorance of minority problems in [the] community, [and would] create[ ] mistrust, alienation, and all too often hostility toward the entire process of government." (*Id.* at 290 quoting) S. Rep. No. 92-415, p. 10 (1971).)

CONCLUSION

For the above reasons, Amici Curiae respectfully urge this Court to reverse the decision of the United States Court of Appeals for the Fourth Circuit.

Dated: April 21, 1988

Respectfully submitted,

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CITY OF RICHMOND,

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BRIEF OF THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, ILLINOIS, MASSACHUSETTS, MINNESOTA, NEW JERSEY, OHIO, OREGON, RHODE ISLAND, SOUTH CAROLINA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING and the DISTRICT OF COLUMBIA

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No. 87-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J. A. CROSON COMPANY,

Appellee.

BRIEF OF THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, ILLINOIS, MASSACHUSETTS, MINNESOTA, NEW JERSEY, OHIO, OREGON, RHODE ISLAND, SOUTH CAROLINA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING and the DISTRICT OF COLUMBIA As *Amici Curiae* In Support of Appellant

INTEREST OF *AMICI CURIAE*

Amici States and the District of Columbia respectfully submit this brief in support of the appellant City of Richmond. *Amici* urge this Court to reverse the judgment of the court below and thus affirm states' and localities' discretion to fashion necessary and appropriate race-conscious remedial measures, such as the City of Richmond's Minority Business Utilization Plan, in order to redress racial discrimination.

Amici recognize the paramount importance of remedying racial discrimination. Substantial progress has been made in overcoming this Nation's legacy of slavery, in significant part as a result of race-conscious remedial measures. That progress will be seriously undercut if governmental entities are deprived of latitude in devising means "to eliminate so far as possible the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). *Amici* have an interest in this case because they need to preserve their ability as public entities to make decisions regarding the awarding of public contracts in an arena -- the construction trade -- where purposeful discrimination long ruled.

Programs, such as the Richmond Plan, which set aside a certain percentage of public construction contracts for minority business enterprises represent a valid exercise of states' and localities' power to decide how the public's money should be spent so as to ensure that all segments of their communities, particularly those minorities historically discriminated against, shall have a realistic opportunity to compete for contracts. It cannot be disputed that the construction industry experienced long-term and pervasive discrimination and that the effects of that discrimination still linger. Set-aside programs not only create new opportunities for minority business enterprises, but do so in a way that minimally burden the rights and fair expectations of non-minorities. To require government entities to point to their own participation in past discriminatory practices as a predicate for developing such plans is not only unnecessary, but creates a powerful disincentive against such efforts, thus running the risk of perpetuating an unjust *status quo*.

Amici have initiated set-aside programs with goals similar to those in the Richmond Plan.[1] *Amici* have a strong interest in

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[1] *See* N.Y. Exec. Order 21 (1983); N.Y. Pub. Auth. Law § 1266-c 14(a)(i) (McKinney 1986); N.Y. Transp. Law § 428(2) (McKinney 1983); N.Y. Unconsol. Laws § 6267 (McKinney 1983); Cal. Gov't Code § 8790.70 *et seq.* (West 1988); Cal. Gov't Code § 14132, eff. Jan. 1, 1989, 1988 Cal. Stats. Ch. 9; Cal. Gov't Code § 16850, eff. Jan. 1, 1989, 1988 Cal. Stats. Ch. 61; Cal. Pub. Cont. Code § 10108.5 (West 1988); Cal. Pub. Cont. Code § 10115, eff. Jan. 1, 1989, 1988 Cal. Stats. Ch. 61; Cal Pub. Cont. Code § 10470 (West 1988); Conn. Gen.

(Footnote Continued)

ensuring that they will continue to exercise discretion in the initiation and implementation of these programs.

The State of New York, by Robert Abrams, Attorney General of the State of New York, and other *Amici* submit this brief pursuant to Supreme Court Rule 36.4.

SUMMARY OF ARGUMENT

Even under the most rigorous standard of scrutiny, Richmond's Minority Business Utilization Plan must be upheld. The City's compelling interest in eradicating past discrimination and its present effects in the local construction industry justified the enactment of a set-aside program for minority business enterprises ("MBEs"). In approving such a plan, the City Council was not constitutionally required to engage in the detailed kind of factfinding or record compilation that courts must employ. Legislative bodies have more latitude than courts in devising remedies to redress racial discrimination because their responsibility to set social policy is so much broader. In addition, the Fourth Circuit was wrong to hold that the City, in order to justify its set-aside, would have to point to evidence of its own complicity in past racial discrimination. Such a requirement would act as a powerful disincentive against the enactment of such programs, thus undermining society's strong interest in encouraging voluntary efforts to end racial discrimination. Accordingly, states and localities need only have a "firm basis" for believing that remedial action is needed. *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842, 1856 (1986) (O'Connor, J., concurring) ("*Wygant*").

In this respect, the powers and duties of states and localities are analogous to those of Congress, whose authority to enact

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Stat. § 32-9e(b) (1987); D.C. Code § 1-1141 *et seq.* (1987 Repl. Vol.); Ill. Rev. Stat. Ch. 127 ¶ 132-600 *et seq.* (1985); Mass. Gen. Laws Ann. Ch. 23A § 39-44 (West Supp. 1988) and Exec. Order No. 237, Mass. Admin. Reg. 509 (1984); Minn. Stat. § 16B.19(5)(6) (1986); N.J. Stat. Ann. 58:11B-26, 5:12-186 (West Supp. 1987); Ohio Rev. Code Ann. §§ 122.71E, 123.151, 125.081; Oreg. Stat. §§ 279.059, 200.005, 200.045; R.I. Gen. Laws 37-14.1-1 *et seq.*; S.C. Act # 170 (1987), § 11-35-5010 of Code of Laws of S.C. (1976, as amended); Wash. Rev. Code § 39.19, Wash. Admin. Code R § 326-30-039; Wis. Stat. §§ 560.036, 16.75(3M), 16.855 (10M), 16.87(2) (1985-86).

an MBE set-aside program for public works projects was upheld in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) ("*Fullilove*"). It is particularly appropriate for state and local governments to enact MBE set-aside programs in the context of the construction trade because of extensive evidence of prior and continuing discrimination in that industry adduced by Congress in hearings on the Public Works Employment Act. That evidence concerned not only discrimination on a nationwide basis, but at the state and local level as well. *Fullilove*, 448 U.S. at 478. Richmond, however, did not rely entirely on the congressional findings, but acquired evidence on its own, generated from a hearing and an examination of local records and statistics. This process formed a reasonable basis for the City's enactment of its MBE set-aside programs.

States and localities are not limited under the Constitution to implementing the narrowest possible programs, but can use their discretion to select means that are equitable and reasonably necessary to redress discrimination. Under the standards enunciated by this Court in *United States v. Paradise*, 107 S. Ct. 1053, 1067 (1987) (plurality opinion) ("*Paradise*"), it is clear that Richmond's set-aside program is sufficiently narrowly tailored to achieve its goals.

First, the 30% set-aside figure, which is roughly halfway between the less-than-1% award of contracts to minority firms and the city's 50% minority population, is analogous to the 10% set-aside figure of the MBE set-aside in the Public Works Employment Act. These figures "necessarily involve a degree of approximation and imprecision," *Paradise*, 107 S. Ct. at 1072 (Powell, J., concurring), but are well within the discretionary competence of the legislative bodies involved. Second, the Richmond Plan is flexible, having waiver provisions which are more generous than those of the federal plan upheld in *Fullilove*. Lastly, the burden imposed on third parties by the Richmond Plan is diffuse, having less impact on the legitimate expectations of non-minorities than race-conscious hiring or promotion goals upheld by this Court.

Finally, an affirmance of the Fourth Circuit opinion would produce the anomalous result of federal and state/local set-aside programs being judged by different constitutional standards.

Such a situation would not only be irrational, but could prove administratively unworkable.

ARGUMENT

POINT I

STATES AND LOCALITIES SHOULD NOT BE REQUIRED TO ENGAGE IN JUDICIAL-TYPE FACT-FINDING PRIOR TO IMPLEMENTING RACE-CONSCIOUS REMEDIAL MEASURES

In 1983, the Richmond City Council determined that race-conscious measures were needed to remedy past discrimination in Richmond's construction industry. This determination followed a review of well-documented evidence regarding nationwide discrimination in the construction trade, including local statistics, as well as a public hearing. The remedial measure implemented -- the Minority Business Utilization Plan -- required contractors with prime City contracts to subcontract at least 30% of the dollar amount of prime contracts to minority business enterprises.

This Court must now address the question of whether states and localities violate the Equal Protection Clause by initiating flexible and temporary remedial measures to eradicate the present effects of past discrimination in the construction trade without having engaged in judicial-type factfinding specifically identifying their own prior illegal discrimination.

Amici respectfully submit that even under the most rigorous scrutiny, the Richmond Plan must be upheld.[2] States and localities must be permitted to implement and maintain

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[2] This Court has not yet agreed on the appropriate level of scrutiny that should be applied for review of race-conscious remedial measures. *Paradise*, 107 S. Ct. at 1064 (plurality opinion). As Justice O'Connor has observed, however, the disparities between the various tests which have been articulated "do not preclude a fair measure of consensus." *Wygant*, 106 S. Ct. at 1853 (1986) (O'Connor, J., concurring). "In particular, as regards certain state interests commonly relied upon in formulating affirmative action programs the distinction between a 'compelling' and an 'important' government purpose may be a negligible one." *Id.*

programs like Richmond's to combat the pernicious effects of longstanding and pervasive discrimination in the construction industry. And, they must be permitted to do so without engaging in duplicative and costly factfinding that may involve admission of prior wrongdoing.

A. *States and Localities Have a Compelling Interest in Eradicating Discrimination and the Power and Duty to Adopt Race-Conscious Remedial Measures*

It is undisputed that the eradication of racial discrimination and its vestiges is a national policy of the "highest priority." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976). The Court has recognized the states' power and duty to eliminate the effects of discrimination through the use of race-conscious measures. *See, e.g., University of California Regents v. Bakke*, 438 U.S. 265, 366 (1977) ("*Bakke*"); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (reapportionment). *See also Paradise*, 107 S.Ct. 1065; *id.* at 1075 (Powell, J., concurring); *Wygant*, 106 S. Ct. at 1856 (O'Connor, J., concurring).[3]

States may broadly delegate this authority to political subdivisions and to administrative or governmental units. *Bakke*, 438 U.S. at 366 n.42 (Brennan, White, Marshall, Blackmun, J.J.), *citing Sweezey v. New Hampshire*, 354 U.S. 234, 256 (1956) (Frankfurter, J., concurring) ("It would make the deepest inroads upon our federal system for the Court now to hold that it can determine the appropriate distribution of powers and delegation within the 48 states").[4]

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[3] Although Justice Powell suggests that Congress has a "unique constitutional role" in combatting racial discrimination, this cannot be construed to imply that the states have a lesser role. *See Fullilove*, 448 U.S. at 516. It can fairly be assumed that he meant "the power was 'notable' or 'unequaled', not 'sole' or 'exclusive' ". *Ohio Contractors Association v. Keip*, 713 F.2d 167, 172 (6th Cir. 1983).

[4] Many states have "home rule" provisions generally authorizing delegation to lesser political subdivisions. *See, e.g.*, N.Y. Const., Art. IX, § 2. The authority of localities to adopt anti-discriminatory measures is well supported. *See, e.g., McDaniel v. Barresi*, 402 U.S. 39 (1971); *Green v. County School Board*, 391

(Footnote continued)

The City of Richmond City Council has a compelling interest in remedying discrimination and is vested with the requisite authority to implement its race-conscious program.[5]

B. *States and Localities Should Not be Required to Engage in Contemporaneous Factfinding*

Like Congress, the Richmond City Council is empowered to legislate without compiling the type of record, or engaging in the level of factfinding required in judicial proceedings. *Fullilove*, 448 U.S. at 478 (Burger, J.); *see also id.* at 502 (Powell, J., concurring). As distinct from the courts, governmental bodies such as the City Council are accountable to their constituents, who can act as a check on arbitrariness. The level of discretion afforded legislative bodies is thus broader than that afforded the courts.[6]

Moreover, to require local governments to make contemporaneous findings of fact and compile judicial-type records, as the Fourth Circuit did, thwarts the objective of eradicating racial discrimination and its vestiges and undermines the ability of local legislatures to implement policy and to most efficiently

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U.S. 430 (1968) (school boards); *South Fla. Chapter v. Metropolitan Dade County*, 723 F.2d 846, 852 (11th Cir. 1984), *cert. denied*, 469 U.S. 871, (1984) (county); *Ohio Contractors Association v. Keip*, 713 F.2d at 172 (general assembly); *Schmidt v. Oakland Unified School District*, 662 F.2d 550 (9th Cir. 1981), *vacated and remanded on other grounds*, 457 U.S. 594 (1982) (school district).

[5] In its first opinion, the Fourth Circuit specifically held that Richmond acted pursuant to delegated powers. *See* Supplemental Appendices to Jurisdictional Statement ("J.S. Supp. App.") at 20. The second opinion implicitly upheld this earlier finding.

[6] *See* Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 Yale L.J. 635, 642 (1982) ("The discretion of judges – particularly Article III federal judges – is properly limited because of their insulation from political control); *cf. Bi-Metallic Co. v. Colorado*, 239 U.S. 441, 445 (1915) (legislature entitled to act without public input because public's "rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule").

use limited resources. *See generally Wygant*, 106 S.Ct. at 1855 (O'Connor, J., concurring). *See also Fullilove*, 448 U.S. at 502 (Powell, J.) ("the creation of . . . rules for the governance of society simply does not entail the same concept of record-making that is appropriate to a judicial or administrative proceeding").

Both the Court and Congress have consistently emphasized the value of voluntary efforts in ending racial discrimination. *Local No. 93 v. City of Cleveland*, 106 S. Ct. 3063, 3072 (1986); *Johnson v. Transportation Agency*, 107 S.Ct. 1442, 1452 n.8, 1453 ("*Johnson*"); *Wygant*, 106 S.Ct. at 1855 (O'Connor, J., concurring); *Bakke*, 438 U.S. at 336-38 (Brennan, White, Marshall, Blackmun, J.J.) (referring to emphasis on voluntariness in Titles VI and VII of the Civil Rights Act). *See also Steelworkers v. Weber*, 443 U.S. 193, 204 (1978) ("*Weber*"). Voluntary implementation of affirmative action programs by public employers is particularly important. These programs serve as models for private employers and include minorities, who might otherwise feel disenfranchised, in an aspect of government. *Wygant*, 106 S.Ct. at 1855 (O'Connor, J. concurring) (citing the amendments extending coverage of Title VII to the states).[7]

Localities, however, will clearly be discouraged from adopting voluntary remedial measures such as affirmative action plans and set-aside programs if those measures must be preceded by factfinding demonstrating that they have engaged in illegal discrimination. *Id.*; *Bakke*, 438 U.S. at 364 (Brennan,

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[7] *Cf. Olmstead v. United States*, 277 U.S. 438,458 (Brandeis, J., dissenting) ("Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example").

To the extent that state procedure and structure has sometimes been criticized as "reinforcing the tendency of majorities to tyrannize minorities," voluntary actions by these governmental units should especially be encouraged. *Assoc. Gen. Contractors v. City of San Francisco*, 813 F.2d 922, 929 (9th Cir.1987) (*quoting* Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 Yale L.J. 1403, 1410 (1982)).

White, Marshall, Blackmun, J.J.)[8] In developing this record, localities might not only fuel existing racial tensions, but would expose themselves to potential liability for prior discrimination.[9] For large public employers like New York State, contemporaneous factfinding would be particularly destructive, and the requirement therefore self-defeating.

Requiring contemporaneous factfinding would further deter the implementation of voluntary programs because it would significantly drain the resources of states and localities, which typically operate on a smaller and less formal scale than do Congress or the courts and which often do not maintain detailed records.[10]

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[8] This Court has heretofore not required actors implementing affirmative plans to demonstrate their own discriminatory conduct. As discussed below, Congress made no such finding before adopting the federal MBE plan approved in *Fullilove*. And, under Title VII, for which the standard of review of affirmative action plans is similar to that under the Equal Protection Clause, an employer is not required to show a violation to justify its affirmative action plan. *See Johnson*, 107 S. Ct. at 1451; *see also id.* at 1442 (Scalia, J., dissenting) (comparing Title VII and Equal Protection); *id.* at 1461 (O'Connor, J., concurring)(same).

[9] *Cf. Johnson*, 107 S.Ct. at 1453 ("A corporation concerned with maximizing return on investment ... is hardly likely to adopt a plan if in order to do so it must compile evidence that could be used to subject it to a colorable Title VII suit").

In other contexts, for the same policy reasons, voluntary efforts to remedy wrongdoing cannot be used as a basis for liability. For example, under the Federal Rules of Evidence, evidence of post remedial repairs, which would necessarily reflect past neglect or wrongdoing, is deemed inadmissible. *See* Fed. R. Civ. P. §§ 407; 408; Weinstein, *Evidence* § 407[02] (1986). The purpose of these rules is to promote the social policy encouraging the adoption of safety measures and repairs. In this case, the Richmond City Council expressed concern that its enactment of a remedial plan would be construed as an admission of past liability. Further findings of liability would have clearly deterred it from adopting the plan. *Hearing on Adoption of Minority Business Utilization Plan, Richmond City Council*, April 11, 1983. Joint Appendix ("J.A.") at 15.

[10] *See, e.g., May v. Cooperman*, 572 F. Supp. 1516, 1564 (D. N.J. 1983), *aff'd*, 780 F.2d 240 (3d Cir. 1985) (N.J. legislature does not maintain records of

(Footnote continued)

Accordingly, states and localities should not be required to engage in contemporaneous factfinding prior to implementing a remedial plan. Rather, the local legislative body must have a "firm basis" for believing that remedial action is needed. *Wygant*, 106 S.Ct. at 1856 (O'Connor, J., concurring).[11] As discussed below, local legislatures must be accorded broad latitude in evaluating evidence and deeming it sufficient to support the determination that a plan is needed.

C. *In Allocating the Burden of Proof, the Challenger Should be Required to Demonstrate the Illegality of the Locality's Plan*

If the plan is challenged after its enactment, the appropriate allocation of the burden of that proof is for plaintiffs to bear the burden of demonstrating their rights have been violated. *Id.* Accordingly, the state or locality should not bear the burden of demonstrating its constitutionality.[12] Nor should the

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hearings and debates). *See also S.W. Washington Chapter, National Electrical Contractors Association v. Pierce*, 100 Wash. 2d. 109, 667 P.2d 1092, 1110 n.2 (1983) ("Local legislative bodies ... cannot be expected to undertake the expense of detailed recordkeeping comparable to that of Congress, which operates on a national scale"); *cf. Oregon v. Mitchell*, 400 U.S. 112, 195 (1970) (Harlan, J., dissenting) (scant availability of official state materials on adoption of fourteenth amendment as compared with available federal materials); *see also* Note, *Principles of Competence: The Ability of Public Institutions to Adopt Remedial Affirmative Action Plans*, 53 U.Chi.L.Rev. 581, 614 (1986).

[11] In *Fullilove*, Justice Powell suggested a lower standard, stating that Congress can act if it "perceives a basis" and the reviewing Court "should uphold a reasonable congressional finding of discrimination." 448 U.S. at 504 n.4 (Powell, J., concurring).

In addition, the development of evidence demonstrating the need for a program naturally continues after a program is enacted; as part of their function, state agencies responsible for monitoring compliance with the program gather information and facts evincing the necessity for the program. This evidence should be sufficient to rebut a challenge to a program's constitutionality.

[12] In addition, a presumption of validity necessarily attaches to legislation. *See, e.g., Schlib v. Kuebel*, 404 U.S. 357, 371 (1971); *McGowan v. Maryland*, 366 U.S. 420, 425 (1960); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144 (1943).

governmental unit then be required to demonstrate prior unlawful discrimination; the challenger must maintain the "ultimate burden to demonstrate the unconstitutionality" of the plan. Only by meeting this burden can the challenger rebut the presumption that the plan had a firm basis. *Wygant*, 106 S.Ct. at 1849; *id.* at 1856 (O'Connor, J. concurring). Under this approach, the reviewing court is not required to make a finding of prior discrimination to uphold the plan. *Id.*

This allocation of the burden of proof is additionally appropriate because it takes into account the remedial purpose underlying a locality's implementation of a program and its efforts to redress past discrimination. *See generally United Jewish Organizations v. Carey*, 430 U.S. at 161 n.19 (discussing burden of proof under Voting Rights Act which inures to benefit of individuals long discriminated against).

D. *Localities Should be Accorded Latitude in Determining that a Need for a Remedial Measure Exists*

In *Fullilove*, a plurality of the Court found Congress's findings of discrimination sufficient to uphold the federal MBE provision. In examining the legislative history of this provision, the Court referred to the ample historical evidence Congress had before it evincing discrimination against minority businesses, and of prior legislative and administrative programs intended to ameliorate discrimination, of which Congress was aware. *Fullilove*, 448 U.S. at 468, 478 (Burger, C.J.); *id.* at 503 (Powell, J., concurring). Justice Powell wrote,

> [Congress's] special attribute as a legislative body lies in its . . . mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce

> the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Fullilove, 448 U.S. at 503 (Powell, J., concurring). The Court upheld the plan despite the lack of specific findings as to past discrimination by Congress in its distribution of public contracts. *See Fullilove*, 448 U.S. at 540 (Stevens, J., dissenting) ("The legislative history of the Act does not tell us when, or how often, any minority business enterprise was denied such access"); *see also id.* at 527 (Stewart, J., dissenting). The same latitude must be accorded local legislatures in determining that there is a need for a local affirmative action or MBE plan.

The longstanding history of discrimination in the construction industry has been recognized by the Court, Congress, the President and the states. For example, this Court has observed that the exclusion of blacks from the "crafts" unions -- the entry point and training ground for skilled construction workers -- is so commonplace as to warrant this Court's "judicial notice." *Weber*, 443 U.S. at 198 n.1. And, as chronicled in *Fullilove*, the 1977 Public Works Employment Act ("PWEA") followed prior executive and congressional efforts to combat discrimination in minority businesses. *See Fullilove*, 448 U.S. at 457-463 (Burger, C.J.).[13]

In addition to referring to the legislative history of the Public Works Employment Act, general findings of societal discrimination and the long history of discrimination in the construction industry, the Court specifically referred to the "direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting." *Fullilove*, 448 U.S. at 478 (Burger, C.J.).

Localities must be able to rely on these abundant findings of discrimination in the construction industry as a basis for their MBE programs; to view them as irrelevant would indeed be

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[13] *See also Assoc. General Contractors v. Altshuler*, 490 F.2d 9; 12 n.1; 11-14 (1st Cir. 1973), *cert denied*, 416 U.S. 957 (1971) (discussing history of discrimination and referring to scholarly works).

"myopic."[14] Duplication of factfinding by the federal and state branches is clearly wasteful and unnecessary, particularly given the evidence Congress culled regarding state and local construction contracts.[15] Requiring such duplication similarly ignores the highly pertinent experience and expertise that Congress has gained in this area. *Cf. Fullilove*, 448 U.S. at 503 (Powell, J., concurring). Moreover, in at least one other context, the Court has approved the reliance of cities on relevant findings made by other cities.[16] Similarly, since it is appropriate for a state to rely on federal policy to inform its own policy choices,[17] it is *a fortiori* appropriate for a state to rely on congressional findings.

Finally, localities should be able to rely on the congressional findings to support MBE programs for public construction programs, not because they wish to eradicate broad societal discrimination, but because it is in within their power to address a limited field in which the discrimination has been amply documented. *Cf. Wygant*, 106 S. Ct. at 1846.

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[14] *Cf. M.C. West, Inc. v. Lewis*, 522 F.Supp. 338, 349 (M.D. Tenn. 1981) (upholding Secretary of Transportation's federal highway MBE program).

[15] Furthermore, the potential overlap between Congress's factfinding and that of the state reflects that under our system of government, there may be "a multiplicity of agents and institutions performing the same functions." This suggests the utility of shared reliance on information and minimizing duplication of resources. *Compare* Cover, *Dispute Resolution: A Forward*, 88 Yale L.J. 910, 913 (1979) (positing the idea of blurring the functions of courts and administrative bodies). *Amici* nonetheless recognize that each branch of government may apply data differently depending on those affected.

[16] *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986)(in an area involving first amendment rights, a city is "entitled to rely on the experiences of...other cities, and in particular on [other] 'detailed findings'... The first amendment does not require a city, before enacting...an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses").

[17] *See, e.g., Plyler v. Doe*, 457 U.S. 202, 251 (1981) (Congress's exclusion of individuals from particular social welfare programs may provide policy basis for same state action).

1. *Localities Should Not Be Restricted In the Type of Evidence They May Consider as a Basis for a Race-Conscious Program*

Localities should not be compelled to justify their programs based on a fixed mathematical formula.[18] Furthermore, while localities could appropriately rely solely on congressional findings, other findings may provide them with a sufficient basis for determining that implementation of a race-conscious program is warranted to remedy past discrimination. This evidence may include pending lawsuits; court orders; testimonial evidence; earlier studies by committees; investigations; comments received in response to the publication of a rule; and unemployment statistics and census data.[19]

2. *States and Localities May Have Compelling Interests in Implementing Race-Conscious Measures Aside From Remedying Past Discrimination*

Race-conscious construction programs may additionally be justified on grounds other than the need for remediating prior

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[18] *Accord Alexander v. Louisiana*, 405 U.S. 625, 629-31 (1971). In the jury context, for example, the Court stressed that "the Court has never announced mathematical standards for the demonstration of 'systematic' exclusion of blacks, but has, rather, emphasized that a factual inquiry is necessary in each case that takes into account all possible explanatory factors." *But see, e.g., J. Edinger & Son v. City of Louisville, Kentucky*, 802 F.2d 213 (6th Cir. 1986) (citing *Wygant* to support proposition that fixed formula must be used to demonstrate prior discrimination).

[19] *See, e.g., Ohio Contractors v. Keip*, 713 F.2d at 17 (awareness of litigation, executive department investigations; earlier studies by committees); *M.C. West, Inc. v. Lewis*, 522 F. Supp. at 347 (comments responding to publication of rule); *South Fla. v. Dade County*, 723 F.2d at 846 (reference to past discrimination). *See also Fullilove*, 448 U.S. at 540 (Stevens, J.) (evidence of litigated claims on behalf of MBEs could provide basis). *See generally* Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. Chi. L. Rev. 213, 217 n.9 (1986) (suggesting use of unemployment statistics and census data). States should be able to engage in extensive factfinding if they so choose, and to draw from the experience of other states in engaging in this factfinding.

discrimination. In *Bakke*, for example, Justice Powell found that "the attainment of a diverse student body" justified the use of racial criteria. *See Bakke*, 438 U.S. at 311-314 (Powell, J.);[20] *see also Wygant*, 106 S. Ct. at 1868 (Stevens, J., dissenting) (noting benefits of an integrated faculty); *Johnson*, 107 S. Ct. at 1460 (Stevens, J., dissenting) ("statutes enacted for the benefit of minority groups should not block these forward-looking considerations").

In *Wygant*, Justice O'Connor stated,

> Certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have not been passed on here to be sufficiently "important" or "compelling" to sustain the use of affirmative action policies.

Id. at 1853. In evaluating these "other governmental interests," however, the Court should recognize the unique ability of localities to evaluate the purposes that would be served by race-conscious measures.[21] For example, in enacting a publicly funded construction project, the State of Massachusetts emphasized the desirability of concentrating minority employment in projects in or near minority neighborhoods. The plan was therefore designed not only to increase minority employment, but to alter "the geographic distribution of placements." *Assoc. General Contractors v. Altshuler*, 490 F.2d at 14 n.10. Such interests should be deemed sufficiently weighty by this Court to uphold a plan.

3. *The Findings Supporting Richmond's Enactment are Sufficient to Uphold It*

The City of Richmond had a "firm basis" upon which to conclude that a remedial plan was needed. Moreover, Richmond's

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[20] Justice Powell relied, at least in part, on statements by a University President to justify this finding. *Id.* at 312 n.48.

[21] *Cf. Oregon v. Mitchell*, 400 U.S. at 207 (Harlan, J., dissenting) (discussing states' ability to evaluate local needs); *see generally*, Point II, *post*.

findings were sufficient to satisfy even the most exacting level of scrutiny. The City determined that Richmond shared the nation's problems of discrimination in the construction industry. J.A. at 41. The City Council conducted a vigorous debate, hearing from at least seven witnesses who spoke for and against the plan, including an MBE owner and members of contracting associations. *See* Hearing; Jurisdictional Statement, Appendix A, ("J.S. App.") at 6a. The City Council heard extensive testimony that the construction trade associations in Richmond contained virtually no black members. J.S. App. at 17a. And, none of the witnesses opposing the plan disputed the existence of discrimination in the construction industry, although denying that their individual associations engaged in discrimination. The City also reviewed historical records of city contracting, as well as a statistical study which demonstrated that while minorities composed half the City's population, they had received less than 1% of the City's contracting business.

Upon this basis, the City was fully justified in enacting its program.

POINT II

THE CITY OF RICHMOND'S MBE SET-ASIDE PROGRAM IS NARROWLY TAILORED TO ACCOMPLISH ITS PURPOSE

This Court has said on more than one occasion that race-conscious remedial measures, in order to survive constitutional scrutiny, must be narrowly tailored to achieve their goals. *Wygant*, 106 S. Ct. at 1846, *quoting*, *Fullilove*, 448 U.S. at 480. At the same time, this Court has taken care to note that remedial plans need not be limited to the least restrictive means of implementation. *Paradise*, 107 S. Ct. at 1073, *citing*, *Fullilove*, 448 U.S. at 509 (Powell, J., concurring). *Paradise* involved the power of a trial court to fashion appropriate race-conscious remedies, but the same considerations support giving states and localities breadth and flexibility in fashioning remedies to redress past discrimination. *See* above, point I, D. Like the courts, states and localities are "in the best position to judge whether an alternative remedy ... would have been effective ... in ending discriminatory practices," *Local 28 Sheet Metal Workers v. E.E.O.C.*, 106 S. Ct. 3019, 3056 (1986), (Powell, J., concurring), and to assess whether or not a particular race-conscious program is appropriate.

In determining the constitutionality of the means selected, this Court has examined a variety of factors. These include: (1) efficacy of alternative remedies and necessity for the relief; (2) duration of relief; (3) relationship between percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (4) flexibility and availability of waiver provisions; (5) impact of the relief on the rights of third parties. *Paradise*, 107 S. Ct. at 1067-73; *Fullilove*, 448 U.S. at 511-16 (Powell, J., concurring); *see also Wygant*, 106 S. Ct. at 1850-52; *id.* at 1857 (O'Connor, J., concurring).

The Fourth Circuit focused on the last three criteria to support its determination that the City's plan was not sufficiently

narrowly tailored. As shown below, however, the MBE set-aside provision falls well within the permissible range of the City of Richmond's authority.

A. *Relationship between Percentage of Minority Subcontractors and the Relevant Population or Workforce*

In *Fullilove*, Justice Powell found the percentage chosen for the set-aside program to be within the scope of congressional discretion. *Fullilove*, 448 U.S. at 514 (Powell, J., concurring). The 10% set-aside figure in the federal PWEA represented an approximate midpoint between the percentage of minority contractors and the percentage of minority group members in the nation. *Id.* at 514-15. In the Richmond City Council's hearing, testimony revealed that blacks constituted less than one percent of construction contractors involved in all crafts, which was roughly equivalent to the percentage of minorities awarded city construction contracts. J.S. App. at 20a. In determining the proper percentage for the set-aside, the City Council determined that a figure roughly halfway between less than one percent and the fifty percent minority in the population of Richmond would be appropriate.

The set-aside "necessarily involve[d] a degree of approximation and imprecision" as did the interim promotion goal set in *Paradise*. *Paradise*, 107 S. Ct. at 1072 (Powell, J., concurring), *quoting*, *Teamsters v. United States*, 431 U.S. 324, 372 (1977) ("*Teamsters*"). In *Paradise*, Justice Powell recognized that the district court, which had set the one-black-to-one-white promotion ratio, had first-hand knowledge of the parties and the potential for resistance, and imposed the requirement that it determined would compensate for past delay and prevent future recalcitrance, while not unduly burdening the interests of the non-minorities. To do less, the district court determined, would have perpetuated the effects of past discrimination. Similarly, the City of Richmond, having first-hand knowledge of the potential for resistance to minorities in the construction industry, made

a reasonable determination that a 30% set-aside was necessary to undo the past effects of discrimination.[22]

B. *Flexibility and Availability of Waiver Provisions*

The Richmond plan anticipates situations where an MBE is "not available or unwilling to participate in the contract to enable [the prime contractor] meeting the 30% MBE goal." J.S. Supp. App. at 51. The plan included as an "unwilling" MBE, one that, enjoying a monopoly on the market, submitted inflated bids. *See* J.S. Supp. App. at 52-53. In such a situation, the prime contractor could request a total or partial waiver of the 30% requirement. J.S. Supp. App. at 67-68.

The Richmond plan includes broader administrative relief than that upheld in *Fullilove*. Although the federal plan had a waiver provision for grantees, a non-grantee did not have standing to challenge the grant to an MBE. In contrast, the Richmond plan allows non-grantees standing to challenge the qualifications of an MBE as a minority enterprise. J.S. Supp. App. at 13 n.5. Finally, prime contractors are given assistance in locating MBEs. If no qualified minority candidate is available, the requirement may be waived. *Id.* at 67-68.

In sum, the flexibility written into the Richmond plan is at the very least, similar to that approved by this Court in *Fullilove*.

C. *Impact of the Relief on the Rights of Third Parties*

Before approving a race-conscious remedy, consideration must be given to the effect of the remedy on innocent third parties. *See Teamsters*, 431 U.S. at 374-75. However, the mere existence of such an effect should not prevent implementation of the remedy because, as this Court has recognized, "[a]s part of this Nation's dedication to eradicating racial discrimination, innocent

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[22] Alternatively, the 30% set aside can be seen as a means by which the City Council sought to regulate the speed by which a reasonable proportion of minority subcontractors would be brought into the market. *See Paradise*, 107 S. Ct. at 1071 (Powell, J., concurring).

persons may be called upon to bear some of the burden of the remedy." *Wygant*, 106 S. Ct. at 1850 (Powell, J., joined by Burger, C.J. and Rehnquist, J.) Chief Justice Burger's observations in *Fullilove* are pertinent here:

> The actual "burden" shouldered by nonminority firms is relatively light in this connection when we consider the scope of this public works programs as compared with overall construction contracting opportunities. Moreover, although we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.

Fullilove, 448 U.S. at 485-86.

The *Wygant* plurality found preferential lay-offs to be an impermissible burden on innocent third parties, and found the remedial plan unconstitutional. In doing so, Justice Powell contrasted the *Wygant* preferential lay-off scheme and the *Fullilove* set-aside, noting that in the latter, the "actual burden shouldered by non-minority firms is relatively light." *Wygant*, 106 S.Ct at 1850-51.[23]

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[23] In contrasting the effect of lay-off plans and those of hiring goals, Justice Powell remarked:

> the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.

Id. at 1851. The burden on non-minorities imposed by set-aside programs is even less than that imposed by hiring goals, as hiring goals completely delay an opportunity for a job, whereas a set-aside only affects a portion of the contracts a contractor or subcontractor may receive.

The burden on innocent parties is further limited in the Richmond plan as the set-aside only involves 30% of the subcontracting for city construction projects. This leaves the level of minority participation in prime construction contracting untouched. Consequently, it imposes a diffuse burden and does not disproportionately harm the interests or unnecessarily trammel the rights of innocent individuals. *Paradise*, 107 S. Ct. at 1073; *Wygant*, 106 S. Ct. at 1853-54 (O'Connor, J., concurring).

POINT III

STATE PROGRAMS AND FEDERALLY FUNDED PROGRAMS SHOULD NOT BE REVIEWED ACCORDING TO DIFFERENT STANDARDS

As discussed above, this Court has recognized the necessity of according Congress broad discretion in adopting race-conscious remedial measures. To subject state and local cities to more rigorous standards in their adoption of similar measures would indeed be anomalous. The folly of applying dual standards of review to state or local MBE programs and federally-funded MBE programs is most striking when considered in the context of federal grant programs. Under these programs, state and local governments must have set-asides to receive federal funds.[24]

Assuming *arguendo* that the stricter standards are applied only to state and local MBE programs, *amici* will, on the one hand, be required to have set-asides in their federally funded projects to receive federal funding while, on the other hand, be deterred from implementing the same or similar MBE programs for their projects. This result is particularly illogical given that the construction industry with whom the state contracts for its own projects is the same industry with whom it contracts for its partially federally funded programs, and the same industry which has a documented history of discrimination.[25]

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[24] *See, e.g.*, 42 U.S.C. § 6705(f)(2) (Public Works Employment Act requires state and local government grantees to spend at least 10% of the grant for MBE's).

[25] *But see Illinois Builders Association v. Ogilvie*, 327 F. Supp. 1154 (S.D. Ill. 1971), *aff'd*, 471 F.2d 680 (7th Cir. 1972) (federal government has relied upon a plan originally conceived by state officials for their own state funded contracts indicating that state and federal findings would be the same). Moreover, taken to its conclusion, the dual requirements would mean that if the federal government withdrew funding from a partially-federally funded project, the state would then have to engage in rigorous factfinding to continue contracting with the existing work-force. *Compare Kromnick v. School District of Philadelphia*, 739 F.2d 894, 899, 905 (3d Cir. 1984) (in school desegregation case, when federal phase of project ended, school board continued remedial policy in absence of specific findings or consideration of alternative remedies).

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be reversed.

Dated: New York, New York
April 21, 1988

Respectfully submitted,

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Supreme Court of the United States

October Term, 1987

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Appellant,

v.

J. A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE

INTERESTS OF AMICUS

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of appellee. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, incorporated under the laws of California for the purpose of participating in litigation affecting public policy. Policy of the Foundation is set by a Board

of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of a brief amicus curiae in this matter.

Pacific Legal Foundation has participated in cases which involved issues similar to that presented in this matter. The Foundation's public policy perspective and litigation experience in support of individual liberties will help provide this Court with additional argument in which to view the holding of the Fourth Circuit Court of Appeals in this matter.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 822 F.2d 1355 (4th Cir. 1987).

STATEMENT OF THE CASE

This case presents the issue whether a city may enact a plan in which minority contractors are guaranteed a fixed percentage of city funded construction contract awards to remedy alleged discrimination, in the absence of a showing by the city that it engaged in such prior discrimination.

In April, 1983, the City Council of Richmond, Virginia (City), enacted a minority business utilization plan which required that contractors on city construction projects subcontract at least 30% of the dollar value of the contract to minority-owned business enterprises (MBEs) unless the city waived the requirement. The plan was to terminate in 1988 at which time the City Council could renew it or allow it to lapse. Only nonminority prime contractors were required to comply with the plan's provisions. If a nonminority contractor failed to meet the MBE requirement the contract would be suspended or terminated unless a waiver was granted.

In September, 1983, the City invited bids for the installation of stainless steel urinals and water closets in the city jail. J. A. Croson Co., not itself an MBE, was the only bidder on the project. Contending it was unable to locate any minority subcontractors except one it considered unqualified, Croson requested a waiver of the MBE requirement. The City denied the waiver request. Croson informed the City that the cost of the project would increase by $7,663.16, if it were required to use the unqualified contractor. The City responded, stating the minority subcontractor was qualified and that Croson's fixed bid could not be increased.

Soon thereafter, the City rebid the project and invited Croson to submit a new bid. Croson sued in District Court, arguing the City's racial set-aside plan was contrary to Virginia law governing competitive bid procedures and that it violated the United States Constitution. The District Court held the City's plan was

consistent with both Virginia law and the federal Constitution. A divided panel of the Court of Appeals (Fourth Circuit) affirmed. This Court granted certiorari in the *Croson* case and remanded it back to the Court of Appeals for reconsideration in light of the United States Supreme Court's decision in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), decided by this Court after the Court of Appeals' affirmance. Following reconsideration, the Court of Appeals held the City's racial preference plan must be invalidated, and reversed the District Court's decision.

SUMMARY OF THE ARGUMENT

This case involves the issue of whether a government enacted affirmative action plan that grants racially-based preferences violates the Fourteenth Amendment of the United States Constitution.

Pacific Legal Foundation believes that the key to the validity of such affirmative action plans lies in the adequacy of the findings necessary to support the plan. Absent a clear showing of racial discrimination, a governmentally imposed racial preference is an arbitrary and capricious act and itself constitutes invidious discrimination.

The findings necessary to support an affirmative action plan must clearly demonstrate discrimination. A mere statistical disparity has never been held sufficient by this Court and, furthermore, such statistical evidence must be relevant and clearly define the nature of

the discrimination and the parties discriminated against.

The remedy afforded by an affirmative action plan must be narrowly tailored to correct the past discriminatory acts particularized in the findings. The Fourteenth Amendment protects individual rights and does not countenance group preference merely to obtain racial balance or attain other political as opposed to constitutional objectives.

ARGUMENT

I

TO SHOW THAT A RACE PREFERENTIAL PLAN IS JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST, THE STATE MUST FIRST MAKE A SHOWING OF PRIOR DISCRIMINATION BY THE GOVERNMENTAL UNIT INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." City ordinances are considered state action for the purposes of this amendment. *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938).

The Court has traditionally rejected distinctions between citizens solely because of their ancestry as being " 'odious to a free people whose institutions are founded upon the doctrine of equality.' " *Regents of the University of California v. Bakke*, 438 U.S. 265, 294 (1978) (quoting *Loving v. Virginia*, 388 U.S. 1, 11, 18

(1967), and *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). This principle is inherent in the Equal Protection Clause because the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

Therefore, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid, *Fullilove v. Klutznick*, 448 U.S. 448, 496 n.l (1980) (Powell, J., concurring), and can be upheld only upon an extraordinary justification. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).

The sources of the justification must rest in the discrimination sought to be corrected by the classification. If no discrimination exists, amicus submits that a preferential affirmative action plan enacted by a governmental entity becomes racial discrimination outlawed by the Fourteenth Amendment.

This Court has held that government bodies may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination. *Wygant v. Jackson Board of Education,* 476 U.S. at 277, plurality opinion. "[R]emedying past or present racial discrimination . . . is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program." *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring in part and concurring in

judgment). *See also United States v. Paradise*, 480 U.S. ___, 94 L. Ed. 2d 203 (1987).

This Court has insisted, however, that there be some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications to remedy such discrimination. *Wygant*, 476 U.S. at 274, plurality opinion. "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 276.

A government unit wishing to employ racial preferences may not act on the grounds of amorphous assumptions of historical discrimination. To allow such acts on so tenuous a finding would grant local governments unfettered discretion to adopt sweeping racial preferences at their pleasure, irrespective of the need. It is to guard against such abuse that this Court in *Wygant* required the particularized findings of prior discrimination. *Id.*

Even if the City admitted to its own discrimination against minority contractors this would not suffice to meet the constitutional standard. Where the danger of discrimination against nonminorities exists it is crucial that there be evidence showing that the governmental entity now seeking remedial action engaged in the prior discriminatory acts. *J. Edinger & Sons, Inc. v. City of Louisville, Kentucky*, 802 F.2d 213, 216 (6th Cir. 1986) (citing *Wygant*, 476 U.S. at 276). *See also Michigan Road Builders Association, Inc. v. Milliken*, 834 F.2d 583, 589 (6th Cir. 1987):

> "Before a state may permissibly employ a racial or ethnic classification . . . it must make a finding

> based upon material factual evidence, that it has in the past discriminated against classes it now favors. If the state had not engaged in discrimination against racial and ethnic minorities in awarding contracts . . . in the past, then it cannot assert *in praesenti* that it has a compelling interest in preferring MBEs in the award of such contracts."

In *United States v. Paradise*, 94 L. Ed. 2d at 203, this Court reemphasized this need for a suitable basis. *Paradise* upheld race-conscious relief imposed by the District Court upon findings of discriminatory conduct. The record in *Paradise* established that for four decades the Alabama Department of Public Safety systematically excluded blacks from employment and promotion. This Court held that the race conscious relief imposed was amply justified.

In *Croson*, by contrast, the Richmond City Council's hearing failed to establish the basis for remedial action. The proceedings revealed no record of prior discrimination by the City in its award of public contracts. Only conclusory and highly general statements made by a member of the public (not in the construction business), a city council member who supported the plan, and the city manager were offered as a showing of past discrimination. As the Court of Appeals observed: "The plan was not supported by any impartial report, any meaningful statistical evidence, or even by anecdotal allegations of prior discrimination." *Croson*, 822 F.2d at 1360. There was "no showing that qualified minority contractors who submitted low bids were passed over or that qualified minority firms were excluded from the bidding pool." *Id.* at 1359.

II

MERE STATISTICAL EVIDENCE OF SOCIETAL DISCRIMINATION IS NOT SUFFICIENT TO SUSTAIN A RACIALLY CONSCIOUS AFFIRMATIVE ACTION PLAN

The principal evidence cited by the City in support of its racial preference program was statistical data comparing the percentage of minority contracts granted by the City with the total number of minority residents in the community. The statistics, introduced to show a discriminatory practice, indicated that while minorities comprised 50% of Richmond's population, minority-owned firms had received only 0.67% of the dollar value of Richmond's prime contracts. *Id.* at 1358.

Such use of general population statistics is insufficient to justify the type of preferential affirmative action plan set forth by the City of Richmond. As this Court held in *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977):

> "There can be no doubt . . . that the District Court's comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases. The Court of Appeals was correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market."

In *Croson* the appropriate comparison should be between the number of minority contracts awarded and the number of qualified minority contractors available in Richmond. Showing that a small number of city

contracts went to minority firms does not demonstrate discrimination when, as both sides agreed, the number of minority-owned contractors in Richmond was also quite small. 822 F.2d at 1359.

While this Court has stated that statistics are competent in proving employment discrimination their usefulness depends on all of the surrounding facts and circumstances. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 (1977). In *Teamsters*, the comparison between the percentage of blacks on the employer's work force and the percentage of blacks in the general areawide population was highly probative because the job skill involved there–the ability to drive a truck–is one that many persons possess or can fairly readily acquire.

When special qualifications are required to fill particular jobs, however, comparisons to the general population may have little probative value. *Hazelwood School District v. United States*, 433 U.S. at 308. *See also Johnson v. Transportation Agency*, 480 U.S. ___, 94 L. Ed. 2d 615, 631 (1987). Here the city was put on notice that under state law it was unlawful to engage in, or offer to engage in, general contracting or subcontracting in the state on a job of $40,000 or more without being duly licensed under Title 54, Chapter 7 of the Code of Virginia, a class A license contractor requirement. Joint Appendix at 32.

Other circuits have similarly rejected the use of general population statistics to establish discrimination patterns. *See Associated General Contractors of California, Inc. v. City and County of San Francisco*,

813 F.2d 922, 930 (9th Cir. 1987), and *J. Edinger and Son, Inc. v. City of Louisville, Kentucky*, 802 F.2d 213. In *Edinger*, the court held that a large discrepancy between the percentage of minority residents in the county and the percentage of business conducted with minority-owned businesses by the city was insufficient to support a minority vendors' ordinance according preference in bidding on supply and service contracts with the city to minority-owned businesses. The fundamental flaw in the comparison is that the general public does not bid on city contracts, only contractors do. *Id.* at 215-16. As the court noted, "reliance upon general population statistics is especially troubling given that bid systems, by definition, are inherently nondiscriminatory." *Id.* at 216. Thus, the City should be required to present evidence of invidious discrimination against minority-owned businesses in order to justify the preferential treatment afforded minority vendors. *Id.*

Having failed to adduce evidence of its own discrimination sufficient to justify its race based program, City attempts to compensate by an attack on the program's victims. Thus City claims that its council "was aware that there has been pervasive racial discrimination in the nation's construction industry." Brief of appellant at 6. For this proposition City cites *Fullilove*, 448 U.S. at 477-78, as "finding that Congress had 'abundant evidence' of racial discrimination in the construction industry to support its remedial action." Brief of appellant at 6-7.

This is a disingenuous reading of the *Fullilove* holding. That statement came in the context of a discussion of state action that had a discriminatory impact in perpetuating the effects of past discrimination. Indeed, the fuller and more accurate quotation is: "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *Fullilove*, 448 U.S. at 477-78. The context makes clear that the Court was referring to discrimination by state and local government through their procurement practices. If City did not discriminate in its procurement practices it has no compelling governmental interest in enacting a race-based "remedy."

The referenced paragraph in *Fullilove* also holds that Congress "may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Id.* at 478. It is plain that the Court was extending exceptional deference to the unique powers of Congress. "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Id.* at 483.

Yet it is apparent that the Court was not altogether comfortable with a race preference program, even one adopted under the special powers reposed by the Constitution in the Congress. Nonetheless, the Court stated: "That the program may press the outer limits of

congressional authority affords no basis for striking it down." *Id.* at 490.

If a program adopted by Congress under the Spending, Commerce, and Fourteenth Amendment enforcement powers may press the outer limits of authority in adopting a 10% set-aside, surely these limits have been shattered by the City's adoption of a 30% quota based solely on its police powers. *Truax v. Raich*, 239 U.S. 33, 41 (1915), specifically rejected the adequacy of the police power as authority to enact race-based quotas.

Unable to present evidence of past discrimination in Richmond, City attempts to use *Fullilove* as a crutch to bolster that burden. City reads *Fullilove* as finding discrimination nationwide in construction contracting, thereby authorizing every hamlet in the land to adopt its own race preference program without further proof. This key tenet of City's dogma was rejected by this Court in *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982). There a state, together with a class of minority group members, citing a pattern and practice of racial discrimination, sought and obtained an order from the District Court directing nonminority contractors to meet detailed minority utilization goals. This Court reversed, holding that minority hiring goals may not be imposed upon contractors absent a supportable finding of liability. *Id.* at 400. Read together, *Wygant* and *General Building Contractors* require a city that imposes a race-based subcontracting requirement on its public contracts to make two showings. First, the City must prove that it discriminated against each of the now preferred groups.

Second, the City must prove that the impacted non-minority contractors discriminated against each of the preferred groups.

General Building Contractors further rejected the racially disproportionate impact theory that forms the sole basis here for City's program. 458 U.S. at 390. That case makes clear that if a state or local governmental entity seeks to enact a race preference program, it must go beyond numerical disparity and find intentional discrimination on the part of those upon whom it intends to thrust the burden of the program. In its narrow reliance on a disparity between the percentage of minority population and the percentage of prime contracts awarded to minorities, the City of Richmond has failed to meet the *General Building Contractors* standards.

III

A RACIAL CLASSIFICATION PLAN DESIGNED TO REMEDY PAST ACTS OF DISCRIMINATION MUST BE NARROWLY TAILORED TO ACHIEVE THAT GOAL

Even if this Court were to find there existed sufficient evidence to establish a finding of prior discrimination, the City's racial preference program fails on the grounds it is not narrowly tailored to address findings of past discrimination. "Race-conscious distinctions must be narrowly tailored to eliminate the consequences of past discrimination." *Associated General Contractors of California, Inc. v. City and County of San Francisco,* 813 F.2d at 934 (citing *Bakke*, 438 U.S. at 299 (opinion of Powell, J.)); *Paradise*, 94 L. Ed. 2d

at 203 (plurality opinion) and at 220 (O'Connor, J., dissenting); *Wygant*, 476 U.S. at 274 (plurality opinion); *Fullilove*, 448 U.S. at 484 (opinion of Burger, C. J.). This means that the classification adopted must " 'fit' with greater precision than any alternative means." *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d at 935 (quoting *Wygant*, 476 U.S. at 280 n.6 (plurality opinion)) (citing Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727 n.26 (1974)).

To begin with, the definition of minority owned businesses is not narrowly tailored to the remedying of the alleged past discrimination. The Richmond plan defines minority group members as citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts. *Croson*, 822 F.2d at 1361. Yet the City has made no showing of past discrimination against each of those particular minority groups. In the words of *Wygant*: " 'There is no explanation of why the Board chose to favor these particular minorities or how in fact members of some of the categories can be identified.' " *Quoted in Croson*, 822 F.2d at 1361.

The lack of narrow tailoring is further emphasized by the fact that the plan makes no attempt to limit its benefits to those specific individual members of minority groups that have in fact been injured by past discrimination. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 578-79 (1984). The favored classes of minorities are defined here not in terms of past

injury but rather as those businesses owned and controlled by one or more minority persons.

Stotts notes that *International Brotherhood of Teamsters v. United States*, 431 U.S. at 367-71, makes clear "that mere membership in the disadvantaged class is insufficient to warrant a seniority [here contract preference] award; each individual must prove that the discriminatory practice had an impact on him." *Stotts*, 467 U.S. at 579. This was also the holding of the lead opinion in *Fullilove* which declared that any plan of this type must prevent unjust participation in the program by those minority firms whose access to public contracting is not impaired by the effects of prior discrimination. 448 U.S. at 482 (opinion of Burger, C. J.). The lack of such safeguards here indicates that the program at issue is not designed to remedy past discrimination, but rather to promote the economic interests of certain classes.

This suspicion is reinforced by the fact that the 30% "goal" has no relation to the number of qualified minority contractors in the Richmond area. One of the more troubling aspects of this case is that apparently the City made no effort to determine the number of licensed minority contractors before adopting its program. It merely selected an arbitrary figure it now claims was approximately midway between the 1% of city contracts awarded to minorities and the 50% of minorities in Richmond. Brief of appellant at 45.

As the Court of Appeals observed: "General population statistics suggest, if anything, more of a political than a remedial basis for the racial preference."

Croson, 822 F.2d at 1358-59. The court sounded the compelling warning that "[i]f this plan is held to be valid, then local governments will be free to adopt sweeping racial preferences at their pleasure, whether those preferences are legitimate remedial measures or bald dispensations of public funds and employment based on the politics of race." *Id.* at 1357-58.

It is precisely to avoid the award of public contracts on a political basis that most states have adopted statutes mandating competitive bidding. Such statutes are designed to protect the public by preventing public officials from awarding contracts uneconomically on the basis of "special friendship," thereby protecting taxpayers from corruption and waste of public funds. *Associated General Contractors of California v. San Francisco Unified School District*, 616 F.2d 1381, 1391 (9th Cir. 1980).

Setting the goal of awarding 30% of City contract dollars to a preferred class of contractors, far out of proportion to their presence in the contracting community, carries "special friendship" in the name of politics to an impermissible extreme. Because the Richmond plan is not tailored to remedy past discrimination, it is itself discrimination on the basis of race and violates the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

In finding that the Richmond plan violated the Equal Protection Clause of the Fourteenth Amendment, the Court of Appeals upheld the principles of *Wygant* which firmly established that a government-enacted racial preference program is not to be tolerated in the absence of evidence of actual discrimination.

Eradicating vestiges of racial discrimination is a legitimate and substantial interest of the state. But, this Court has never approved of a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. *Regents of the University of California v. Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

A particularized finding of discrimination must be made so that the interests of innocent nonminorities will not be invaded without valid justification. "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Id.* at 289.

Because the ordinance operates to discriminate against nonminority contractors under the unfounded guise of remedying discrimination against minorities and is not narrowly drawn to remedy the perceived problem, amicus urges that this Court affirm the decision of the Court of Appeals finding that the Richmond

ordinance violates the Equal Protection Clause of the Fourteenth Amendment.

DATED: June, 1988.

Respectfully submitted,

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Supreme Court of the United States
OCTOBER TERM, 1987

CITY OF RICHMOND,
Appellant,
v.
J.A. CROSON COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE APPELLEE

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE APPELLEE

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae in support of the Appellee, J.A. Croson Company, pursuant to the written consents of the parties.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary, nonprofit association of employers organized to promote sound government policies on nondiscriminatory employment practices. Its

membership comprises a broad segment of the business community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed of experts in equal employment opportunity (EEO). Their combined experience gives the Council a unique understanding of the practical, as well as the legal aspects of EEO policies and requirements.

EEAC members are strongly committed to the goal of equal opportunity for women and minorities. As employers, they are subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.), as well as other equal employment statutes and regulations. In addition, nearly all of EEAC's members are federal contractors subject to the affirmative action requirements under Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14303 (1967), and 43 Fed. Reg. 46501 (1978), as well as the affirmative action requirements that many state and local governments place upon their private sector construction, supply and service contractors.

Many of EEAC's members are signatories to collective bargaining agreements, Title VII settlements, conciliation agreements, consent decrees and other voluntary plans or programs which provide varying forms of remedial relief or affirmative action benefiting persons or groups protected by these statutes and regulations.

EEAC's previous amicus curiae briefs have reflected the commitment of its members to broad flexibility in carrying out voluntary affirmative action programs, while at the same time recognizing that, absent a finding of discrimination, race or sex-based

preferential treatment cannot be required of employers who do not wish voluntarily to adopt such policies. EEAC's most recent brief supporting voluntary affirmative action was filed in *Johnson v. Transportation Agency, Santa Clara County, California*, 107 S.Ct. 1442 (1987).[1]

In addition to their involvement in voluntary employment-related affirmative action, many EEAC members are involved in voluntary affirmative action activities outside of the equal employment arena, including activities designed to promote minority purchasing. Examples of such activities include vendor and buying education programs, advertising for and identification of minority vendors, and the establishment of vendor information exchanges. Through these and similar programs, EEAC members have engaged in substantial and successful efforts to ensure that minority and women-owned businesses participate as their suppliers and contractors. EEAC's members recognize that they benefit directly from strong economies in all communities that they serve,

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[1] EEAC also filed briefs in several other Supreme Court affirmative action cases dealing with the nature and scope of the affirmative action obligations of employers. *See Local Number 93 v. City of Cleveland*, 106 S.Ct. 3063 (1986); *Wygant v. Jackson Board of Education*, 106 S.Ct. 1842 (1986); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

including the growth of minority and women-owned businesses.

As equal employment officers working in conjunction with their companies' purchasing departments, EEAC's member representatives are well aware of the importance of increasing the share of opportunities to businesses owned by minorities, women and economically disadvantaged persons. At the same time, they also are aware that these programs must be undertaken realistically, and with an eye toward the availability of qualified contractors and subcontractors. Thus, on occasion, EEAC has filed briefs expressing concern about minority business enterprise set-asides that, in our view, were not related to the availability of qualified subcontractors, or went beyond remedying past proven discrimination. See EEAC's brief in *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

Our concern with the decision of the court below is that is establishes a thirty-percent minority business set aside for all prime contracts with the City of Richmond without that figure having been related to the availability of qualified minority contractors in the particular business specialty involved. Thus, this brief is submitted with two purposes. First, to encourage the Court to continue to afford latitude for flexible voluntary affirmative action; and second, to urge the Court to reaffirm the principles it has applied in previous affirmative action cases by holding that government-imposed minority business contracting requirements must be related to the availability of qualified minority subcontractors.

STATEMENT OF THE CASE

This case has produced two conflicting decisions by the Fourth Circuit on the constitutionality of a minority set-aside plan for public contracts adopted by the City of Richmond, Virginia. The plan was adopted in response to information presented at a public hearing which indicated that although minority groups made up 50% of the City's population, only 0.67% of the city's prime construction contracts from 1978-1983 were awarded to minority businesses. *See J.A. Croson Company v. City of Richmond*, 779 F.2d 181, 182 (4th Cir. 1985) (*Croson I*), *cert. granted, judgment vacated, and remanded*, 106 S.Ct. 3327 (1986). The plan requires all nonminority contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of the contract to minority business enterprises unless the requirement is waived.

Appellee J.A. Croson Co. (Croson), a non-minority contractor, submitted a bid on a construction contract with the City of Richmond in September, 1983. As it turned out, Croson was the only bidder, and the requirements of the plan were applied to this contract. Croson filed a request with the City for a waiver of these requirements because of problems encountered in subcontracting with a qualified minority business enterprise (MBE). On two occasions the City denied Croson's request for a waiver, advising that its bid would be considered non-responsive if it failed to provide evidence of compliance with the MBE subcontracting provisions. The City decided to re-bid the project, inviting Croson to submit a new bid.

Croson then brought this lawsuit, claiming, among other things, that the plan violated its rights under

the equal protection clause of the Fourteenth Amendment to the United States Constitution. The district court rejected Croson's claims. The court of appeals, in a 2-1 decision affirmed the district court. It held that the plan was constitutional in that it was adopted to remedy the effects of past discrimination and was not overextensive in establishing a 30 percent set-aside figure. In dissent, Judge Wilkinson argued that the factual findings of the city council were inadequate to support a conclusion of past discrimination against minorities in the award of city contracts. 779 F.2d at 204-05. The dissent also urged that:

> . . . the 30% set-aside goal emerges from a vacuum. Rather than a goal narrowly tailored to meet a specific need, the 30% figure is arbitrary and unsupported. No consideration was given, for example, to the number of minority firms available to perform contracts under the set-aside, despite the testimony of several witnesses before the city council that the set-aside goal was unrealistic.

779 F.2d at 205. Thereafter, this Court granted appellee's petition for a writ of certiorari, vacated the judgment of the court of appeals and remanded the case for reconsideration in light of *Wygant v. Jackson Board of Education*, 106 S.Ct. 1842 (1986).

On remand, the same panel found the plan unconstitutional. With Judge Wilkinson now writing for the majority, the court held that under *Wygant*, findings of "societal" discrimination are not sufficient to support a racial preference. Rather, there must have been a firm basis for the City Council to have concluded that there had been prior discrimination against minority contractors and that the set-aside

was related to remedying that discrimination. *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, 1358 (4th Cir. 1987) (*Croson II*), *probable jurisdiction noted*, 56 U.S.L.W. 3568 (U.S. Feb. 22, 1988) (No. 87-998). The court found that no such findings were made in this case. 822 F.2d at 1358-59.

The court also held that the statistical evidence that supports a minority business set-aside must relate to the "percentage of minorities in the local labor force or the construction business" and not be based upon a mere reference to the percentage of minorities in the community at large. 822 F.2d at 1358. The 30 percent figure was found to have no basis in the record and thus the majority found that it was "not narrowly tailored to [the] remedial goal" of remedying past discrimination. 822 F.2d at 1360. In dissent, Judge Sprouse would have held that the City Council had a firm basis for believing that the city engaged in past discrimination in the award of public contracts, and that the plan was narrowly tailored to achieve that end. 822 F.2d at 1362-68.

SUMMARY OF ARGUMENT

In deciding the issues in this constitutional case, the Court should exercise care in dealing with Title VII and employment cases cited in several of the briefs. *See, e.g., Wygant v. Jackson Board of Education*, 106 S.Ct. 1842 (1986); *Johnson v. Transportation Agency, Santa Clara County, California*, 107 S.Ct. 1442 (1987); and *United Steelworkers v. Weber*, 443 U.S. 193 (1976).

EEAC is particularly concerned that in resolving this case, the Court not reconsider or disturb its affirmative action decisions allowing substantial flex-

ibility for voluntary action by employers. For example, in *Johnson* and *Weber*, the Court held that Title VII permits (but does not require) employers to use race or sex as a factor in employment decisions pursuant to affirmative action plans designed to remedy a manifest workforce imbalance, as long as the rights of nonminority and male employees are not unnecessarily trammeled.

On numerous occasions, the Court has taken pains to assure that Title VII and constitutional cases are governed by their respective, separate standards. Therefore, we strongly urge the Court to recognize that this case would not be an appropriate vehicle to reconsider its Title VII employment decisions.

On the merits of the instant case, the decision below properly held that the thirty percent minority contractor set-aside figure was not rationally related to remedying past discrimination because the figure was not related to the availability of minority contractors qualified to perform subcontracting work on contracts let by the City.

This Court's previous decisions have stressed that where special skills are involved, the appropriate statistical analysis is between the utilization and availability of minorities with such skills. Relying on general, minority population statistics is insufficient to support race-based numerical requirements for contractors where special requirements exist.

ARGUMENT

I. IN DECIDING THIS MATTER, THE COURT SHOULD EXERCISE CARE TO ENSURE THAT A DECISION IN THIS PUBLIC SECTOR CASE DOES NOT IMPINGE ON THE ABILITY OF PRIVATE EMPLOYERS UNDER CURRENT LAW TO UNDERTAKE REASONABLE AND VOLUNTARY AFFIRMATIVE ACTION.

As noted in the Statement of Interest of the Amicus Curiae, EEAC's members have a long-standing interest in preserving the flexibility of private employers to undertake voluntary affirmative action, while at the same time, not being required to do so by court order or other government requirements. We recognize, of course, that this public sector case does not directly involve either employment issues or the limitations which Title VII places on the affirmative action efforts of private employers.

Nevertheless, there is a strong possibility that, in addressing the issues presented by the parties and the various amici, the Court will discuss the implications of Title VII and employment cases. Indeed, this case was remanded for reconsideration in light of an employment case—*Wygant v. Jackson Board of Education*, 106 S.Ct. 1842 (1986).

Moreover, in addressing the degree of flexibility that Richmond should have enjoyed in adopting its minority set-aside, many of the briefs before the Court rely upon the Title VII decision in *Johnson v. Transportation Agency, Santa Clara County, California*, 107 S.Ct. 1442 (1987), where the Court upheld the use of sex or race as "one factor" in an employment decision as long as the plan was intended to remedy a manifest workforce imbalance and the

rights of nonminority or male employees were not unnecessarily trammeled—the basic position urged in EEAC's brief in that case.

We are well aware that many of the Court's holdings in *Johnson* were by a close vote and that the Court recently has decided to hear argument on whether one of its major civil rights decisions under 42 U.S.C. § 1981 should be reconsidered. *See Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986), *reargument ordered*, 56 U.S.L.W. 3735 (U.S. April 25, 1988) (No. 87-107) (an employment discrimination case), ordering argument on whether *Runyon v. McCrary*, 427 U.S. 160 (1976) (a private sector school discrimination case), should be reconsidered. We strongly urge that the *Johnson* decision not be reconsidered, and certainly not in the context of this case.

The Court continually has taken pains to draw a line between the standards governing affirmative action under Title VII and the Constitution. *See, e.g., United Steelworkers v. Weber*, 443 U.S. 193, 200, 204, 208, 210 (1976); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 583 (1984); and *Wygant*, 106 S.Ct. at 1851 n.9 (opinion of Justice Powell) ("Since *Weber* involved a private company, its reasoning concerning the validity of the hiring plan at issue there is not directly relevant to this case, which involves a state-imposed plan. No equal protection claim was presented in *Weber*"). Again, in *Johnson*, the majority opinion pointed out that:

> No constitutional issue was either raised or addressed in the litigation below. . . . We therefore decide in this case only the issue of the prohibitory scope of Title VII. Of course, where the issue is properly raised, public employers must

> justify the adoption and implementation of a voluntary affirmative action plan under the Equal Protection Clause. *See Wygant v. Jackson Board of Education*, —— U.S. ——, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986).

107 S.Ct. at 1446 n. 2.

Applying this same principle here, this is a constitutional, not a statutory case, and the parties have not argued that it would be appropriate in this case for the Court to reconsider its previous employment decisions. Therefore this case would not be an appropriate vehicle for reconsideration of the protections afforded to affirmative action under the *Johnson* decision.

II. THE COURT BELOW PROPERLY HELD THAT THE THIRTY PERCENT MINORITY SET-ASIDE FIGURE WAS UNCONSTITUTIONAL BECAUSE IT HAD NOT BEEN SHOWN TO BE RELATED TO THE PRESENT AVAILABILITY OF QUALIFIED MINORITY SUBCONTRACTORS.

A. To Be Constitutional, A Minority Business Set-aside Must Be Narrowly Tailored To Remedying Past Discrimination Against Minority Contractors By The Governmental Entity Adopting The Plan.

While this Court has "yet to reach consensus on the appropriate constitutional analysis" relating to the use of race-based preferences (*United States v. Paradise*, 107 S.Ct. 1053, 1064 (1987)), "[i]t is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination." *Id.*, at 1064. However, to pass constitutional analysis, there must be evidence from which to conclude

that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination. *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980).

In fashioning the remedies for such discrimination, there must be "careful judicial evaluation" to assure that a program "that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal." *Id.* at 480. The government unit involved must make a sufficient showing of past dicrimination before the remedial use of racial classifications will be constitutional. *Wygant*, 106 S.Ct. at 1847.

In the instant case, the court below found that there was not enough evidence in the record to satisfy these standards. 822 F.2d at 1358. Indeed, the court below found that there was no showing that qualified minority contractors who submitted bids were passed over, or that minority firms had been excluded from the bidding pool. 822 F.2d at 1359.

EEAC concurs that generalized statistics based upon a comparison between the minority population and the percent of contracts awarded to minorities is not necessarily probative of discrimination. In the constitutional context, a showing of adverse impact is not sufficient to show a violation of law, or to permit the assumption that the statistical disparity is the result of discrimination. *Washington v. Davis*, 426 U.S. 229, 245 (1976). Thus, "[t]here are a host of social, economic, personal, and demographic factors which may account for the statistical disparity." *J. Edinger & Son, Inc. v. City of Louisville, Ken-*

tucky, 802 F.2d 213, 216 (6th Cir. 1986) (Large discrepancy between percentage of minority residents in county and percentage of business conducted with minority-owned businesses by the city was not sufficient to support minority vendors preference).[2]

B. A Minority Business Set-aside Percentage Must Be Related To The Availability of Qualified Minority Contractors And Not Based Upon Comparisons With Minority General Population Statistics.

Even if the allegations of discrimination in this case are adequate to support some remedy, EEAC is particularly concerned about preserving the principle underlying the holding below that the thirty percent set-aside figure should be struck down because it was not related to the availability of minority contractors qualified to perform the subcontracting work under contracts let by the City.

The City's set-aside program was based primarily on statistics that minorities comprised 50 percent of

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[2] *Accord, Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); and *Michigan Road Builders Association, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1988), *appeal filed*, 56 U.S.L.W. 3806 (U.S. May 11, 1988) (No. 87-1860). As Chief Justice Burger pointed out in *Fullilove*, there are other impediments not necessarily related to discrimination, 448 U.S. at 467:

> Among the major difficulties confronting minority businesses were deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate "track record," lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, pre-selection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses.

Richmond's population, but that minority-owned firms had received only 0.67 percent of the dollar value of City contracts. The City now contends to this Court that the thirty percent set-aside figure was based on a split-the-difference theory, that is: "the thirty percent figure is approximately midway between one percent—the percentage of city contracts awarded to minorities—and fifty percent—the percentage of minorities in Richmond." Br. of Appellant at 46. This argument implicitly admits that there is no relationship between the thirty percent figure and the availability of qualified construction contractors.

As legal support for this theory, the City relies on an observation in Justice Powell's concurring opinion in *Fullilove* that the much smaller ten percent set-aside in that case "falls roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation." 448 U.S. at 513-14. This formulation—which apparently was not adopted by any other of the other Justices in *Fullilove*—has no other support in this Court's opinions and, indeed, seems to be directly at odds with other decisions.

For example, a majority of the Court in *Wygant* made it clear that alleged "societal discrimination" is "too amorphous" a basis for imposing a racially classified remedy. 106 S.Ct. at 1848. Instead, the *Wygant* discussion reveals that the relevant inquiry is a comparison between the minority utilization figure and the availability of *qualified* minorities, as explained in the *Hazelwood* decision.[3] In *Hazelwood*, the United States sued the school district under Title

[3] *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

VII alleging a pattern or practice of race discrimination in teacher hiring. The district court based its finding that there was no discrimination on a comparison between the black teachers and black students in the school district. The court of appeals, however, did not rely on the student-teacher ratio, and instead found a prima facie case of race discrimination by comparing the black teachers in the school district with the percentage of black teachers in the relevant labor market area.

This Court in *Hazelwood* also rejected the district court's comparison between Hazelwood's teacher workforce and its student population as a proper basis for comparison. The Court stated that:

> There can be no doubt in light of the *Teamsters* case, that the District Court's comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases. The Court of Appeals was correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.[4]

Relying on *Hazlewood*, the opinions of Justices Powell and O'Connor in *Wygant* rejected the "role model" theory, under which the number of black

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[4] 433 U.S. at 308. *See also New York City Transit Authority v. Beazer*, 440 U.S. 568, 584-85 (1979); and *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977), both of which required that comparisons be made between the percentage of minorities in an employer's workforce and the percentage of minorities (or women) with the requisite skills in the relevant labor market.

teachers was compared with the number of black students in an attempt to justify a race-based layoff preference in teachers layoffs. *See* 106 S.Ct. at 1847 (Powell), and 1854 (O'Connor). As Justice Powell stated:

> Unlike the analysis in *Hazelwood*, the role model theory employed by the District Court has no logical stopping point. The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose.

This principle was reaffirmed in *Johnson* when Justice Brennan's majority opinion stated that:

> Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications. [Citing *Hazelwood*] (must compare percentage of blacks in employer's work ranks with percentage of qualified black teachers in area labor force . . .).

107 S.Ct. at 1452.

Indeed, the Court went even further in *Johnson* in distancing itself from rigid goals or quotas based on general population statistics. It approved the plan in part because it was flexible and did not always use the ultimate goal of 36% female participation in each job. Instead, the Agency in *Johnson* "acknowledged that such a figure could not by itself necessarily justify taking into account the sex of applicants for positions in all job categories." 107 S.Ct. at 1454. The Court noted that for jobs with special qualifications, the Plan "directed that annual short-term goals be formulated that would provide a more realistic indication of the degree to which sex should be taken into account in filling particular positions." 107 S.Ct.

at 1454. Factors such as turnover, layoffs, transfers, and new openings were to be considered along with the "availability of minorities, women and handicapped persons in the area work force who possess the desired qualifications or potential for placement." *Id.*

Justice Brennan then stressed that had the plan simply calculated imbalances "in all categories according to the proportion of women in the area labor pool and then directed that hiring be governed solely by those figures, *its validity fairly could be called into question.*" 107 S.Ct. at 1454 (emphasis added). In fact, if a plan failed to take distinctions in qualications into account in providing guidance for decisionmaking, "it would dictate mere blind hiring by the numbers"—which would then violate Title VII. 107 S.Ct. at 1454.

Thus, assuming that the standards governing governmental action under the Constitution are at least as strict as the standards governing voluntary racial preferences under Title VII, it follows that minority business set asides that set absolute numbers without considering, *ab initio*, the availability of qualified minority contractors cannot pass constitutional muster.

In *Croson I*, Judge Wilkinson, in dissent, found that the Council considered "absolutely no evidence on the minority subcontractor market." 779 F.2d at 204. He also stated that "the 30% set-aside goal [emerged] from a vacuum." Rather than being a goal narrowly tailored to meet a specific need, the 30% figure was seen as "arbitrary and unsupported." 779 F.2d at 205.

In *Croson II*, the court concluded that the appropriate comparison is "between the number of minority contracts and the number of minority *contractors*, taking into account other relevant variables such as experience and specialities." 822 F.2d at 1359 (emphasis in original). EEAC agrees that this reliance upon realistic availability statistics is a reasonable approach in order to avoid the use of inflated statistics that force the prime contractor to promise to attempt to achieve a minority participation rate that, in many cases, simply will be out of reach.

We recognize that the Richmond plan contains a waiver provision providing that "in exceptional circumstances," the contractor is exempted from the 30 percent requirement if it can demonstrate that "every feasible attempt has been made to comply," and also can show that sufficient, relevant, qualified minority contractors are unavailable or unwilling to participate in the contract. *Croson I*, Appendix B, paragraph D, 779 F.2d 181, 197.

It is, however, difficult to perceive how this procedure saves a constitutionally-infirm set-aside percentage when the contractor bears the burden of making "every feasible" attempt to find nonexistent contractors, only to be confronted with the fact that the waiver is a matter of administrative discretion granted only in "exceptional cases"—a prescription for administrative inflexibility if there ever was one.

Other alternatives were available. For example a much more rational approach would have been to take into account the "availability and capability of Black contractors and subcontractors to do such work" when minority participation goals are set for each contract. *See South Florida Chapter of the Associ-*

ated General Contractors of America, Inc. v. Metropolitan Dade County, Florida, 723 F.2d 846, 853, 858 (11th Cir. 1984), *cert. denied*, 469 U.S. 871 (1984). In that manner, realistic percentage goals for minority contractors with certain specialities (such as plumbing, sheet metal work, carpentry, electrical, lathing, painting, drywall, etc.) could be matched with specific projects, rather than establishing an inflated figure that must be recognized as clearly unrealistic, as well as constitutionally-infirm. While EEAC does not take a position in the validity of this less-intrusive approach, it is clear that Richmond's plan went too far in setting a thirty percent quota unrelated to the availability of qualified minority contractors.[5]

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that this Court should affirm the decision below setting aside as unconstitutional Richmond's mandatory, government-imposed minority business set aside program. In doing so, however the Court also should take care not to disturb its previous decisions which afford employers latitude to engage in voluntary, flexible affirmative action efforts to increase their utilization of minorities, women and other protected

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[5] Even if it should uphold the 30 percent figure in this case, this Court should take care not to disturb the employment-related cases, cited above, pp. 14-17, which establish that where liability is sought to be based on statistical comparisons, such comparisons must be to those persons in the relevant labor market possessing the requisite skills required by the job.

groups in their workforces and in their procurement and contracting practices.

Respectfully submitted,

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J.A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION AND THE LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION

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BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION AND THE LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION

INTEREST OF AMICI CURIAE

The Washington Legal Foundation ("WLF") is a national nonprofit public interest law center with more than 120,000 members and supporters throughout the United States. WLF engages in litigation and administrative proceedings in matters promoting the free enterprise system and the economic and civil liberties of individuals and businesses.

WLF has a record of longstanding interest and involvement regarding the controversial issues of affirmative action, racial quotas, and reverse discrimination.

Firmly committed to the great principle that our Constitution is color-blind, WLF has consistently opposed the self-contradictory notion that affirmative action plans, supposedly designed to assure *equal* opportunity, may legally justify intentional discrimination against individuals because of the color of their skin.

In its pursuit of its view that the equal protection clause and the civil rights laws protect all citizens against discrimination, WLF has filed briefs *amicus curiae* in many of the leading Supreme Court cases in the area. *See e.g., Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

The Lincoln Institute for Research and Education was founded in 1978 to study public policy issues that impact on the lives of black middle America, and to make its findings available to elected officials and the public.

The Institute, based in Washington, D.C., aims to re-evaluate those theories and programs of the past decades which were highly touted when introduced, but have failed to fulfill the claims represented by their sponsors —and in many cases, have been harmful to the long-range interest of blacks. The Institute is dedicated to seeking ways to improve the standard of living, the quality of life and the freedom of all Americans.

STATEMENT OF THE CASE

Appellee J.A. Croson Company ("Croson") is incorporated in the State of Ohio but has its principal place of business in Richmond, Virginia. Because at least 51 percent of the stock of the corporation happens to be owned by a nonminority, Croson's bid of $126,530.00 for the plumbing project, which was the only bid submitted, was rejected by the City. Had Croson been owned and controlled by an Eskimo, Aleut, Black, or Indian, the City would have accepted Croson's bid because under

Richmond's Minority Utilization Plan ("Plan"), the requirement that a minimum of 30 percent of a prime contract be subcontracted to minorities is satisfied if the prime contractor is owned by a minority. Richmond, Va. Code Ch. 24.1, art. VIII-A (1983).

Because Croson was not minority-owned, the only other way Croson could obtain the contract was to subcontract at least 30 percent of the dollar value of the contract to a company whose owner happens to be a minority member. Richmond, Va. Code Ch. 24.1, art. VIII-A(A). Although Croson was ready, willing and able to perform the entire contract at the bid price of $126,530.00, a minority-owned subcontractor eventually responded to Croson's request for quotes which would increase the cost of Croson's bid by some $7,000, or approximately 6 percent. The City denied Croson's requests both to raise its original bid to satisfy the minority subcontract requirement and to waive the requirement.

The Court of Appeals for the Fourth Circuit ruled on remand from this Court that the Minority Utilization Business Plan on its face violated the Equal Protection Clause [1] because there was no evidence of discrimination by the City of Richmond as required by *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), little evidence of any discrimination at all in the construction industry, and that in any event, the Plan was not nar-

[1] Even though Croson is an Ohio corporation, it is well-settled that a corporation is a "person" under the Equal Protection Clause as well as the Due Process Clause of the Fourteenth Amendment. *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936). Only the Privileges and Immunities Clause, which refers to "citizens" rather than "persons" does not apply to corporations. *Id.* *Amici* note however, that most businesses whether minority or nonminority owned, are either sole proprietorships or partnerships, with the corporate form of ownership accounting for less than 5 percent of the types of ownership. *See* U.S. Bureau of the Census *1982 Characteristics of Business Owners* 16 (1985).

rowly tailored to redress any alleged discrimination. 822 F.2d 1355, 1360 (4th Cir. 1987).

SUMMARY OF THE ARGUMENT

The competitive bidding system is inherently nondiscriminatory and race-neutral. The City, in awarding prime contracts, and the prime contractor, in awarding subcontracts, do so on the basis of the lowest bid, not the color of the skin of the bidder. It is no surprise, therefore, that the City could not show any discrimination committed by it or by the local contracting industry. The casual resort by the City to a few statistics to "prove" discrimination is riddled with errors.

Among other things, the City mistakenly looked at only the amount of prime contract dollars awarded to minority-owned firms rather than the more relevant amount of all subcontract dollars. In addition, the City erroneously compared the dollar amount of contracts awarded to the minority population as a whole, rather than the number of minority construction contractors. It is simply absurd to conclude that because Richmond's population is approximately 50 percent black, that 50 percent of all owners of construction contracting businesses should be black. The set-aside program is thus a politically motivated scheme that simply prefers certain racial classes over others and is therefore violative of the Equal Protection Clause.

Even if there were pervasive, identified discrimination in the construction industry as the City simply concludes without any proof, the set-aside program is not narrowly tailored to remedy this perceived problem. Rather, the program simply provides an economic windfall to certain persons based on their race and is counterproductive and morally repugnant.

ARGUMENT

I. THERE HAS BEEN NO FINDING OR CREDIBLE EVIDENCE OF IDENTIFIED DISCRIMINATION BY THE CITY OF RICHMOND OR THE LOCAL CONSTRUCTION INDUSTRY.

In its haste to adopt a 30 percent minority set-aside program for its contracting practices, the City of Richmond made only a passing stab at trying to justify it at the City Council hearing where it was adopted.[2] Even the *post hoc* attempt to do so in its brief before this Court fares no better. Not only did the City of Richmond utterly fail to find that it had discriminated against minorities in its contracting practices, there was no finding or evidence of discrimination by the local construction industry against minorities. Nor is there even an allegation of "societal" discrimination against minorities. Rather, *amici* submit there are a number of legitimate nondiscriminatory reasons to explain the level of minority-owned businesses in the construction industry.

A. There Has Been No Finding That The City Of Richmond Has Discriminated Against Minorities In Its Contracting Practices.

No one disputes the fact that there has been no finding of discrimination by the City of Richmond against minorities in its contracting practices. The failure to find any discrimination by the City comes as no surprise. The competitive bidding process is inherently nondiscriminatory. Companies are awarded contracts by the City on the basis of the lowest bid. The City does not care whether the responsive and responsible bidder was a company that was owned by a person or persons who

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[2] The City Council meeting and public hearing at which the alleged problem of discrimination and the remedial Plan was debated and enacted, took a mere one hour and forty-five minutes. *See* City Brief at 4, n.3.

were white, black, Spanish-speaking, Indian, or Eskimo. Unlike the employment context where arguably the subjective impressions and biases of the employer may come into play in the employment decision, the City looks at the numbers on the bid sheet, not the numbers in the minority population pool. Because there has been no finding of discrimination by the governmental unit involved, the City cannot justify an arbitrary plan which prefers prime contractors who are minority-owned or requires *at least* 30 percent of a contract awarded to a nonminority to be given to minority subcontractors. As a plurality of this Court held in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and as properly followed by the Fourth Circuit below:

> This Court never held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination *by the governmental unit involved* before allowing limited use of racial classifications in order to remedy such discrimination.

476 U.S. at 274 (emphasis added). Because there was no finding of any discrimination by the City of Richmond, it could not set up a racially conscious plan. *Accord Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); *Michigan Road Builders Association, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987).[3]

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[3] *Amici* take exception to the City's reliance on *Fullilove v. Klutznick*, 448 U.S. 448 (1980), for a number of reasons. In the first place, we believe *Fullilove* was wrongly decided and agree with Justice Stevens' dissenting opinion therein that the goal of society is "to eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race." *Fullilove*, 448 U.S. at 547 (Stevens, J., dissenting). Secondly, *Fullilove* was only a facial challenge to the Public Works Employment Act of 1977, and Chief Justice Burger cautioned that the case did not address an application of a set-aside program. 448 U.S. at 486. Third, as noted *infra*, Congress was legislating on a national scale pursuant to its constitu-

B. There Was No Credible Or Convincing Evidence Of Discrimination By The Local Contracting Industry.

Recognizing that the City has not engaged in discrimination, the City next argues that *Wygant* is inapplicable to this case and that the existence of discrimination by a vaguely defined "contracting industry" is sufficient to set up a race-conscious contracting system. The City argues that it was a "passive participant in that discrimination" and can therefore institute its race-conscious plan without violating the Equal Protection Clause. City Brief at 40. *Amici* submit that even if *Wygant* does not control this case—although we maintain that it does—and that discrimination by the governmental unit involved need not be found, the City of Richmond has nevertheless failed to provide credible or convincing evidence that there was, as it now claims, "identified, purposeful discrimination in Richmond's construction industry that had caused an extraordinary racial imbalance in the awarding of city construction contracts." City Brief at 40.

The flimsy evidence that the City claims demonstrates that the local construction industry discriminates against minorities does not even come close to the requisite level of the convincing evidence which this Court has held is necessary to justify a limited race-conscious plan. *See, e.g., Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S.Ct. 3019 (1986) (union found guilty by compelling evidence of actual repeated and "egregious" violations of Title VII). The proper level or standard of judicial review in a case like this is one of "strict scrutiny" in examining both the factual predicate of discrimination and whether the plan is "narrowly tailored" to remedy the discrimination and no more. As Justice

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tional powers and its findings cannot be conveniently "borrowed" for Richmond. Finally, this Court's recent decision in *Wygant*, which compelled this Court to remand the case to the Fourth Circuit in the first place, limits the reach of *Fullilove*. *See also J. Edinger & Son, Inc. v. City of Louisville, Ky.*, 802 F.2d 213, 215 (6th Cir. 1986).

O'Connor correctly noted in her concurring opinion in *Wygant*, "This standard reflects the belief, apparently held by all members of this Court, that racial classification of any sort must be subjected to 'strict scrutiny,' however defined." *Id.* at 1852, citing the various opinions in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) and *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). As will be demonstrated, the Richmond Plan does not even survive casual judicial scrutiny.

As the abbreviated City Council hearing on the adoption of the Plan (reproduced in the Joint Appendix) clearly demonstrates, the only so-called "evidence" of discrimination by the local contracting industry was the meaningless statistic that Richmond's minority population, primarily black, constitutes approximately 50 percent of the total Richmond population, whereas less than 1 percent of the dollar amount of the City's *prime* contracts were awarded to the lowest bidder who happened to be minority-owned. *See* J.A. 41. The other meaningless statistic adduced during the hearing and prominently reproduced in chart form on page 22 of the City's brief, is the breakdown of the composition of members in some of the various contractor trade associations in the Richmond and Virginia area that shows only a handful of black members belonging to those organizations. From these two meager and meaningless statistics, the City leaps to the facile conclusion that there is "pervasive" and "identified, purposeful discrimination in Richmond's construction industry . . ." City Brief at 40. This is utter nonsense.

1. *There Mere Fact That Few Minority Owned Construction Firms Belong To Certain Contracting Trade Associations Is No Evidence Of Discrimination By The Local Construction Industry.*

Throughout the short City Council hearing, much attention was focused upon the fact that only a handful of black-owned firms belonged to certain construction

trade associations, and in some cases, none at all. If the City of Richmond is implying that these trade associations discourage or do not allow black-owned construction firms to join as members, the City is clearly wrong. The unrebutted testimony of the various representatives who testified at the City Council hearing indicates that they welcome minority members and have sought them out, but that they apparently do not want to join. *See, e.g.*, J.A. 38 (statement of Al Shuman). In addition, it would be violative of the anti-discrimination laws to exclude minority members. *See* 42 U.S.C. 2000e (1982); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). There is not a scintilla of evidence of any complaint or lawsuit filed by any minority charging that he or she was refused membership in any of the trade associations listed in the City's brief. Accordingly, these bald membership figures are completely irrelevant and do not lend any support to the *ipse dixit* by the City that "identified, purposeful discrimination" exists in the construction industry. City Brief at 23, 40.

It is not clear whether the City is also trying to use the membership figures to demonstrate that the number of minority-owned construction firms in Richmond is small, and that the small number of such firms somehow is itself evidence of discrimination by the industry.[4]

If that is the City's position, a few facts are in order. According to the Bureau of Census, there were 1,563 black-owned firms in the City of Richmond in all industries in the relevant time period. U.S. Bureau of the Census, *1982 Survey of Minority-Owned Business Enterprises: Black* 88 (1985). Of those firms, there were 144 black-owned firms in Richmond in the construction industry, hardly a "small" number. Most of the black-owned firms in Richmond were concentrated in the serv-

[4] "The record in this case contains no finding on the precise number of contractors in Richmond who were minority in 1983, though . . . the number is 'quite small.' J.S. App. 7a." City Brief at 23, n.37.

ices and retail trade industries. *Id.* (*See* Appendix hereto for the various industry categories). But the fact that only a handful of the 144 black-owned construction firms decided to join the selected trade associations listed is not evidence of discrimination. The other black-owned firms may have voluntarily joined other associations that may cater to their special needs, such as the National Association of Minority Contractors Associations, the Metropolitan Business League, Richmond Minority Assistance Center, or the Virginia Minority Supplier Development Council, Inc. *See* Virginia Department of Minority-Owned Enterprises, *Minority Owned Businesses of Virginia* (1986). After all, the fact that slightly less than half of all the lawyers in America belong to the American Bar Association does not mean the ABA has discriminated against the other half. Nor does it mean that the National Bar Association which is composed primarily of black lawyers discriminates against white lawyers.

Unable to make anything out of the membership figures, the City in desperation casts a wider net at the "well documented history of racial discrimination throughout the nation's construction industry." City Brief at 23. Here is where the City's analysis falls completely apart. In an attempt to shore up the paucity of any evidence of discrimination by the local contracting industry, the City tries to use discrimination found on a *national* scale as justification for its local remedial program. The obvious defects with this tactic are at least threefold:

a. The City of Richmond is not the Congress and cannot legislate on a national scale. Any justification for its remedial plan must be based on discrimination found within its city limits, especially because the construction industry is inherently diffuse and locally based.

The City's attempt in its brief to borrow heavily on the findings made by this Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), *United Steelworkers of America v.*

Weber, 443 U.S. 193 (1979), and a number of studies that show that "black workers for years have been excluded from the skilled construction trade unions" (City Brief at 23) is thus unavailing.

b. Amici do not dispute the prior judicial findings that trade and craft labor *unions* have discriminated against minorities. Hiring halls have been used by the unions to supply union workers to construction sites on a daily or project basis. If the unions exclude blacks, or if blacks become union members but are not selected for jobs at the hiring hall, they are unfairly denied the opportunity to work in the construction industry and develop their skills. This documented problem of historical discrimination by the craft unions, especially in the industrial cities of the Northeast, however, has *no* relevance to Richmond. The City has overlooked the simple but important fact that Virginia is a "right to work" state and has been one since 1947. Union membership is *not* required as a condition of employment. Va. Code Ann. §§ 40.1-58 to 69 (1986). Thus, while Virginia employers could technically enter into an exclusive hiring hall contract with a labor union, they are unlikely to do so in a right to work state such as Virginia.

c. There was *no* evidence produced at the City Council hearing of any construction company (or labor union for that matter) having discriminated against blacks. Not a single black contractor testified complaining of discrimination. Even in its *post hoc* rationalization, the City's attorneys are unable to cite in their brief to a single example of discrimination or even alleged discrimination by any of Richmond's nonminority-owned construction firms. No lawsuit, court order, administrative complaint, or even an anecdote has been cited indicating that any minority has ever been discriminated against by any Richmond-area construction company. The only case the City could cite as evidence of discrimination in the con-

tracting industry is an irrelevant 15-year-old *school* desegregation court case. City Brief at 26, n.45 (citing *Bradley v. School Board*, 462 F.2d 1058 (4th Cir. 1972)). *Amici* submit that the Fourth Circuit below was being more than charitable when it characterized the City's evidence of discrimination in the construction industry as being "spurious" and "nearly weightless."[5] 822 F.2d 1355, 1359 (4th Cir. 1987).

2. *The Comparison Between The Percentage Of The Minority Population In Richmond And The Percentage Of* Prime *Contracts Awarded To Minority-Owned Contracting Businesses Is No Evidence Of Discrimination Because It Ignores,* Inter Alia, *The Percentage Of* Subcontract *Work Awarded To Minorities And The Percentage Of Minority-Owned Contractors.*

The centerpiece of the City's proof of allegedly "identified, purposeful discrimination in Richmond's construction industry" is the mere fact that less than one percent of the City's prime contracts were awarded to minority-owned firms, whereas the population of Richmond is approximately 50 percent black. This statistic, like the membership statistic discussed above, is meaningless and deceptive for any number of reasons. The following analysis will consider some of the flaws on both sides of this equation.

a. There is no discussion as to how many times minority-owned firms have submitted bids to the City in order to begin to make any comparison. If the

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[5] Even the dissent in *Wygant* noted that there were specific and numerous valid complaints of discrimination against minority teachers by the Jackson Board of Education in the early 1970's, and that "tensions in the schools had escalated to violent levels." 106 S.Ct. 1842, 1859 (dissenting opinion by Marshall, J. joined by Brennan and Blackmun, JJ.). Nothing even remotely similar can be said of the construction industry in Richmond.

minority-owned contractors in existence do not regularly submit bids and perhaps decide to concentrate instead on private rather than public construction projects,[6] the award of the contracts to the nonminority-owned contractors who do bid on the project is not surprising, and is certainly not evidence of any discrimination in the local construction industry.

b. If minority-owned contractors do submit bids regularly but are rejected because their bids are higher than the nonminority-owned firms, that too is no evidence of discrimination. As noted earlier, the competitive bid process is inherently non-discriminatory and race neutral. Nor does such a result indicate that the local construction industry discriminated against minorities by being able to bid lower than them on a project.

c. The City's reliance on the less than one percent figure of the dollar amount of *prime* contracts awarded to minority-owned businesses is totally misleading because it fails to take into account the percentage of all public contract dollars reaching minority-owned firms *via* sub-contracts awarded by the nonminority firms. Just as it is in the City's interest to award prime contracts to the lowest bidder, so too is it in the interest of the prime contract to subcontract out certain work where feasible to the lowest bidder.[7] Viewed in this light, the record shows that the percentage of city contract dollars reaching minority-owned businesses was "seven or eight [percent] on the overall . . . [and] is in the 20's, somewhere between 17 and 22 [percent], I believe [for contracts under the Community Development Block Grants

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[6] In the construction industry, approximately 75 percent of the business is in the private sector and 25 percent in the public sector. U.S. Dept. of Commerce, *Survey of Current Business* S-7 (April 1988).

[7] Certain kinds of major construction projects such as road paving simply do not lend themselves to being subcontracted out.

(CDBG)]." J.A. at 16 (statement of City Manager Manuel Deese).

It is *amici*'s understanding that the 7 or 8 percent overall figure only accounts for the subcontract work allocated to the CDBG. In other words, the City had no figures on the dollar amount of subcontract work being given to minorities on non-CDBG work, and simply took the 20 percent work on CDBG and divided into the total amount of all contracting dollars. If the City took into account the dollar amount of subcontracts going to minorities, and assuredly there were some, the overall 7 or 8 percent figure would be higher. Thus, if the City's attempt to show discrimination is by looking at the total amount of city dollars reaching the pockets of minority-owned businesses, the more appropriate figure is the 7-20 percent figure rather than the *prime* contract percentage of less than one percent, especially where the remedy chosen is a subcontract minority set-aside program.

d. The City's comparison of prime contracts awarded to minorities with the percentage of minorities in the general population of Richmond to prove discrimination is totally inappropriate. It makes no sense whatsoever to look at the general population statistics and expect that there should be a correlation to the percentage of that group in a particular occupational field such as public construction anymore than one would expect to see a statistical similarity in any other discrete occupation. Does the fact that Richmond's population is 50 percent black mean that 50 percent of all tax attorneys in Richmond should be black, or 50 percent of all speech therapists, or 50 percent of all piano tuners? It would be a statistical oddity indeed to find each occupational category to contain the same or approximate ratio of minorities as there are in the general population. To suggest that statistical discrepancies constitute discrimination in discrete occupational categories, particularly

ones requiring ownership of the business as in this case, is pure sophistry.

If one is trying to build a discrimination case solely on statistics, and *amici* do not think it can be done in an inherently neutral competitive bidding system, the more relevant comparison is not with the general population, but as the court below noted, "between the number of minority contracts and the number of minority *contractors* . . . . " 822 F.2d at 1359 (emphasis in original). *Accord J. Edinger & Lon, Inc. v. City of Louisville*, 802 F.2d 213, 216 (6th Cir. 1986) (no evidence of statistical disparity between "percentage of qualified minority business contractors" and "percentage of bid funds" awarded); *Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987).[8] *See also Hazlewood School District v. United States*, 433 U.S. 299, 308 (1977), where this Court looked at the difference between the number of those employed and the qualified labor pool, *not* the general population.

But even the comparison between the percentage of bid funds awarded and percentage of qualified minority business contractors may be an overly generous one because of the nature of the contracting system. To illustrate, assume that minorities were awarded over 40 percent of the *number* of contracts or subcontracts but those contracts were small item contracts such that in the aggregate, they account for only 10 percent of the total *dollar* amount of all contracts awarded over a period of time. Thus, a few large turnkey projects awarded competitively and nondiscriminatorily to a nonminority firm will skew the percentages if large and small contracts are lumped together. Yet the lower 10 percent figure is hardly evidence of discrimination. The Richmond Plan nevertheless guarantees minorities a right, in effect, to 100 percent of the *number* of contracts at a

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[8] Not surprisingly, the City nowhere cites in its brief, let alone attempts to deal with, the *Edinger* and *San Francisco* opinions.

minimum of 30 percent value for each separate contract. Thus, the unique features of the contracting system underscore the inherent flaws in trying to "prove" discrimination by using simplistic aggregate figures. To put it another way, in the personnel employment situation, for example, only *one* person can hold *one* position or slot at a time. Thus, there is a one-to-one relationship on both sides of the employment statistical equation. In the contracting system, however, contracts have widely differing dollar values and are not fungible.

Contracts have widely different purposes as well. Some construction contracts may be for plumbing work as in the instant case, or for the paving of public roads. Not all contractors are equipped or qualified to bid on all contracts. In the employment context, however, a teacher is a teacher (see *Wyant, supra*), or a policeman is a policeman. *See United States v. Paradise*, 107 S.Ct. 1053 (1987). Their duties and qualifications can be adjudged to be the same for each such occupation. Not so in the construction industry. Consequently, even the use of the percentage of the existing qualified minority contractors may be an inflated yardstick to use in this case.

e. Because a comparison of the percentage of the total dollar amount of contracts awarded to minority contractors with the percentage of qualified minority contractors in the Richmond area is a better indicator of the existence of any discrepancy than the use of general population statistics, the question that remains is, what is the percentage of qualified minority contractors in Richmond. The only evidence in the record is a national figure of 4.7 percent. J.A. 35 (Statement of Patrick Murphy). If this 4.7 percent figure applies to Richmond, then minority-owned firms in Richmond, which were getting at least 7 percent of the contract dollars before the Plan was adopted, were receiving a disproportionately *greater* share than their numbers would apparently warrant. Even if the percentage of the minority-owned firms

in Richmond is actually double (9.4 percent) or triple (14.1 percent) the national average, the percentage of contract dollars already awarded to such firms, *i.e.*, 7 to 20 percent, would be still within a reasonable range, considering the vagaries of the contracting system as previously described.

Thus, even if minority contractors constitute 6 percent of all the contractors, and receive only 3 percent of the dollar value of all contracts, that result cannot be called discrimination any more than it would be to say that there is discrimination against qualified firms that are owned by white males over the age of 65 because they too may constitute 6 percent of all contractors yet receive only 3 percent of the dollar value of all contracts.

Accordingly, the 30 percent figure mandated by the City not only "emerged from the mists" as the Fourth Circuit properly noted, 822 F.2d at 1360, but the figure is grossly out of line with the results one would expect in Richmond from a race-neutral contracting system.

3. *There Is No Evidence That There Even Was Any "Societal" Discrimination Against Minority Contractors.*

Not only has the City failed to show "purposeful, identified discrimination" in the construction industry in Richmond, there is no evidence or even any allegation that there was "societal" discrimination that explains the small number of minority contractors. There is no allegation, for example, that minorities, because of the color of their skin, were denied credit or loans from banks to obtain the needed capital to start up a contracting business. There is no allegation that vendors refused to rent or sell trucks or equipment to blacks so that they may equip their companies. There is no allegation that business schools or colleges denied them admission. Indeed, there is a host of federal and state laws that prohibit such discrimination.

Even the dissenting judge in the Fourth Circuit below in this case admitted that "there was no suggestion before the Council that . . . the minimal presence of minority contractors in that endeavor was caused by such 'societal' discriminatory factors as past inferior education or lack of access to social institutions." 822 F.2d at 1366 (Sprouse, J., dissenting).

Since there was no discrimination by the City, no credible evidence of discrimination by the Richmond "contracting industry," and not even allegations of "societal" discrimination, we are left with a case, which the City and their supporting *amici* may find hard to accept, suggesting no discrimination at all. Consequently, the alleged discrimination in this case is far weaker than the "societal" discrimination found in the *Wygant* case which this Court ruled was insufficient to justify a race-conscious remedial plan.

4. *There Are Numerous Nondiscriminatory Reasons To Explain The Number And Size Of Minority-Contracting Firms.*

Just as Justice Powell noted in *Wygant* that there are "numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind," 106 S.Ct. at 1848, so too in this case are there numerous nondiscriminatory reasons to explain the difference between the percentage of the minority population of Richmond and the percentage of minority-owned contracting businesses.

Unlike the task of seeking employment which requires very little capital (*e.g.*, cost of transportation to job interviews), starting one's own business, especially one in the construction industry, is a very expensive and risky proposition requiring substantial capital. A simple fact of life is that as a class of people, blacks do not have as much assets as those owned by whites. In 1984,

"[m]edian assets owned by blacks were only 9 percent of those owned by whites." D. Gilliam, "Fostering Black Enterprise," *Washington Post*, May 30, 1988, at B3 at col. 5 (citing "The Color Line and Quality of Life In America."). While the City and its supporting *amici* would no doubt quickly ascribe "racial discrimination" to that statistical disparity too, one finds that Asians, West Indians, and Ethiopians (the latter two groups having the same skin color as American blacks), fare much better in opening businesses here than U.S. Blacks. *Id.* Indeed, one may even argue that the Great Society giveaway programs of the 1960's led blacks to place undue dependence on the government, causing a decline in self-reliance, skills, and motivation so necessary for starting one's own business.[9]

The respected Booker T. Washington Foundation and other self-help black groups are trying to improve the economic status of the black community with economic education rather than through cries of "discrimination" and government handouts or quotas. In so doing, these groups are trying to identify the true causes for the low amount of black enterprise and seeking to remedy them. Charles Tate, the executive director of the Booker T. Washington Foundation stated that "Equity capital

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[9] There may be cultural differences that explain the various successes of certain groups in certain industries. As noted black scholar Thomas Sowell observed:

> Some groups that have been tremendously successful in some activities have been utter failures in other activities requiring no more talent. Even such an economically successful urban group as American Jews had an unbroken string of financial disasters in farming, while immigrants from peasant background succeeded . . . . [U]nless we are prepared to deny free choice to the supposed beneficiaries of "affirmative action," it is arbitrary social dogma to expect an even distribution of results.

T. Sowell, *Dissenting from Liberal Orthodoxy: A Black Scholar Speaks for the "Angry Moderates."* (American Enterprises Institute, Dec. 1976).

shortage in the black communities is the major reason that the level of business and economic development are low." *Washington Post, supra.* In addition, "[m]istrust of each other is a key problem . . . Blacks have traditionally shied away from pooling their money to go into economic ventures . . . ." *Id.* Even in the Washington, D.C. area with "about a million blacks . . . with a level of education and professional achievement in the black community probably unmatched in the United States, local black business ownership and black-controlled economic development are woefully small." *Id.* It is not surprising, therefore, that blacks in the Richmond area do not own a larger number of contracting businesses due to reasons having nothing to do with discrimination.

As for the viability of contracting businesses once they start, that too involves additional capital, cash flow, bonding requirements, and the like. In other words, once a black-owned business is started, it faces the same problems faced by a nonminority to keep the business viable. But in a free enterprise system, success is never guaranteed. Businesses, both black and white, struggle and oftentimes fail.

There may be a host of other nondiscriminatory reasons why blacks do not form construction companies. The very risk of such venture, combined with a profitability of less than 10 percent, may lead them into more profitable lines of self-owned business like retailing or personal services where capital requirements may also be lower. *See* Appendix hereto for a break down of black-owned firms in Richmond. Or they may be content to be an employee and rise up the ladder in their chosen career. After all, many successful corporate executives are mere employees and do not "own" the companies they work for.

In short, the statistical disparity between black-owned construction firms in Richmond, Virginia and the black population in Richmond is certainly not evidence of "pur-

poseful, identified discrimination" in the local construction industry.

II. THE RICHMOND PLAN IS NOT NARROWLY TAILORED TO REMEDY THE ALLEGED DISCRIMINATION.

Assuming that the City's meager statistics constitute firm evidence of pervasive, identified racial discrimination in the contracting industry, that alone does not mean that the City is free to set up any kind of race-conscious remedy. On the contrary, any such plan must be narrowly tailored to remedy the specific effects of the discrimination and no more. *Wygant*, 106 S.Ct. at 1849-50. In this case, the Richmond plan falls far short of satisfying this test.

A. In the first place, it is unclear precisely what the City is trying to accomplish by this plan. If they believe that the low number of minority-owned firms is due to discrimination, and that they want to increase the number of firms, then this plan does not accomplish that at all. All that this plan is designed to do is to give 30 percent of the city's contracting dollars to existing minority firms in the form of a windfall. Thus, this situation is totally unlike the remedial measures upheld in the employment context such as in *Paradise* and *Sheet Metal Workers* cases where additional minorities are necessarily brought into the workforce. Nor is there any pretense made by the City that the 30 percent set-aside program will attract new firms into the business. As noted earlier, there are many reasons that inhibit the formation of new construction firms. *Amici* doubt that a temporary set-aside program will necessarily be a sufficient inducement to blacks to start their own firms.

B. If the economic viability of all minorities in Richmond is the concern of the City, this plan certainly does not address that issue. In other words, this Plan is only concerned with the minority who owns the firm, not the

people who may be employed. Nonminority firms may employ more blacks than the minority firms such that the total amount of dollars going to all minorities as wages may actually decline because of the set-aside program. During the hearings on this plan, Councilmember Gillespie asked whether the proponents of the measure have "assessed the impact that this [plan] is going to have on employment among blacks, which is one of our most significant problems."

> MR. DEESE: I can't assess that. . . .
>
> * * * *
>
> MR. GILLESPIE: Since you don't know, and since it is a problem in our City, is it worth assessing the impact before we act on the bill?
>
> MR. DEESE: I don't think that's necessary.

J.A. at 44-45.

C. Not only does the plan neither increase the number of minority firms nor increase minority employment, giving instead a windfall to existing minority firms, but also the windfall is not even limited to minority firms in the Richmond area. During the Council hearings on this measure, representatives of the contracting industry indicated how difficult it was to locate qualified minority firms in the area. Even in the instant case, the Croson company had solicited subcontract bids from minority firms located in Pittsburgh and North Dakota. *See Croson v. City of Richmond*, 779 F.2d 181, 183, n.4 (4th Cir. 1985). It is *amici's* understanding that the current experience under the Richmond plan is that in order to satisfy the 30 percent set-aside provision, there is extensive use of minority firms located in Atlanta or Philadelphia. How does this practice allegedly remedy the alleged discrimination in Richmond? What compelling interest does Richmond have to assist minority firms in other states?

D. Another broad feature of the plan is that the 30 percent set-aside figure can be satisfied by using any

minority firm and not just one owned by blacks. Thus, firms owned by an Eskimo, Aleut, Hispanic, or Oriental would satisfy the city's plan, without a single black firm being aided.[10]

This overreaching aspect of the plan is clearly not narrowly tailored to remedy the alleged discrimination against the black community. Justice O'Connor similarly criticized the race-conscious plan struck down in the *Wygant* case that included Orientals, Indians, and other minorities as illustrative of the "undifferentiated nature of the plan. There is no explanation of why the Board chose to favor these particular minorities. . . . Moreover, respondents have never suggested—much less formally found—that they have engaged in prior, purposeful discrimination against members of each of these minority groups." 106 S. Ct. 1842, 1852, n.13 (O'Connor, J., concurring).

E. The 30 percent figure is an arbitrary number that, as previously noted, bears no appropriate relationship to the relevant class, i.e., the number of minority-owned firms. Further evidence of the arbitrariness of the percentage selected is that the Richmond Plan has set a *20* percent figure as a goal for minority contracting for all city contracts other than construction contracts. *See* Plan Article VIII-A(A), para. 2.

F. While the Richmond plan does have a waiver provision, that feature in and of itself will not salvage an otherwise overly broad remedy. Indeed, in the case at bar, Croson was denied a waiver as well as the opportunity to raise his bid to accommodate the excessive mark-up of some $7,000 offered by the minority firm, Continental Hose Company. 822 F.2d at 1357.

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[10] *Amici* note that there are only three Eskimos and two Aleuts living in Richmond, out of a population of some 220,000. U.S. Bureau of the Census, PC80-1-B48, *1980 General Population Characteristics, Virginia*, Table 15 (1982).

This restrictive use of the waiver provision is certainly not the kind discussed in the *Fullilove* case where Chief Justice Burger noted that "as to specific contract awards, waiver is available to avoid dealing with an MBE who is attempting to exploit the remedial aspects of the program by charging an unreasonable price, i.e., a price not attributable to the present effects of past discrimination." 448 U.S. 448, 488. There is no similar provision in the Richmond Plan to prevent such windfalls going to minority firms, and as described in the following section, minority set-asides have proven to be a costly program to taxpayers and other elements of society. Accordingly, the Fourth Circuit below was correct in doubting that "any waiver, let alone the restrictive waiver provisions in this case, could cure the objectionable aspects of the Richmond ordinance." 822 F.2d 1355, 1361.

G. If the City's concern is to eliminate discrimination in the construction industry, a narrowly tailored remedy would be to simply debar all contractors from the bidding process who discriminate against minorities in employment, or who refuse to deal with minority contractors who have given them the lowest bid price on a subcontract.

Accordingly, the Plan is defective because it is not narrowly tailored in a number of respects to remedy the alleged discrimination. *Amici* submit, however, that the Court need not even address the issue of whether the Plan is narrowly tailored since the predicate finding of firm evidence of discrimination is simply lacking.

III. RACE-CONSCIOUS PROGRAMS SUCH AS SET-ASIDES ARE COUNTERPRODUCTIVE, COSTLY TO SOCIETY, AND MORALLY REPUGNANT.

The widespread use of minority set-asides by a number of cities and states has produced a wealth of evidence showing that these programs have deleterious effects on the economy and society. In addition, they are morally repugnant because they are designed to prefer certain members of society simply because of the color of their skin. In a free, competitive, color-blind society, there should be equality of opportunity, not equality of results.

In 1985, the U.S. Civil Rights Commission undertook a comprehensive study of the experience gained during a decade of the use of minority set-asides. Hearings were held on March 6-7, 1985 and are reproduced in two informative volumes entitled "Selected Affirmative Action Topics in Employment and Business Set-Asides" (hereinafter "Set-Asides"). Numerous witnesses testified on both sides of the issue, and some common sense notions of the competitive contracting system were revealed. For example, Kurt A.J. Monier of the Associated Specialty Contractors, Inc., noted that:

> Subcontractors are not and should not be selected on the basis of race, sex, or other nonrelevant criteria by any prime contractors with enough good judgment to remain in business unless such selection is mandated by government edict. In practice, the subcontractors are selected on the basis of their competitive price and ability to perform the work. [Set-asides] are nonsolutions to nonproblems that threaten to eliminate subcontractor competition on government work.

Set-Asides, Vol. 2 at 243.

Joan G. Haworth, an economist and researcher, reviewed the employment statistics between 1972 and 1982 and found that the minority share of self-employed work-

ers remained constant at 6.2 percent. In the construction industry, however, the field most targeted by set-aside programs, the minority share of self-employed workers declined from 5.8 percent in 1972 to 5.4 percent in 1982. Set-Asides, Vol. at 80-81.

The reasonable conclusion that minority set-asides provide a windfall to existing minority-owned firms rather than to help develop new minority businesses is also borne out by other studies. An investigation of the principal beneficiaries of the set-aside programs has revealed that:

> their median annual sales and after-tax profits are respectively, $741,000 and $32,500, and they are nearly as profitable as nonminority businesses of comparable size. These larger scale minority enterprises . . . have benefited most from set-asides, and they cannot—as a group—be accurately characterized as "deprived."

Set-Asides, Vol. 1 at 149 (statement of Professor Timothy Bates, Professor of Economics, University of Vermont).

This information suggests that the set-aside programs have primarily benefited wealthier minority group members—the ones least in need of government assistance.

In addition to the fact that set-asides seem to be counterproductive, there is also evidence that their negative economic impact is also felt. According to a 1979 General Accounting Office report on the public work set-aside program upheld in *Fullilove*, it was discovered that the "price quotes of minority firms averaged about 9 percent higher than normal prices." GAO, *Minority Firms on LPW Projects: Mixed Results* 18 (1979). *See also* Set-Asides, Vol .2 at 274-75 (testimony of G. Paul Jones, Jr., citing 30 percent cost differential between set-aside participant and low bidder); *id.* at 246 (statement of Kurt A.J. Monier) (citing 300 percent cost differential between

minority participant in Small Business Administration's Section 8(a) program and nondisadvantaged bidder.)

Besides being ineffective and costly to the taxpayers who pay for the government contracts, the set-aside programs necessarily impact on non-minority businesses, many of which are small and have been placed under economic pressure because of these programs. For example, Ralph D. Stout, Jr., who twice served on President Carter's White House Conference on Small Business, testified before the Civil Rights Commission about the experience of his subcontracting company, Southern Seeding Service, which performs erosion control or grassing work on the highways of North Carolina. Although he had been successful in the past in receiving bids, the set-aside programs had "literally legislated [his company] out of the marketplace." Set-Asides, Vol. 2 at 135. *See also Hearing Before the Subcomm. on Transportation of the Senate Comm. on Environment and Public Works on The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act*, 99th Cong., 1st Sess. 334 (testimony of John C. Vande Velde, owner of Warning Lites of Illinois noting that because of set-asides, that his lower bid prices were not accepted and that his business's success rate in bidding on contracts dropped from about 40 percent to 3 percent from 1984 to 1985).

If the goal of society is to provide equal opportunity to minorities, the goal is best accomplished not by set-asides in the contracting industry, but by ensuring that all invitations for bids for government contracts receive the widest circulation in the minority business community. That of course is the true essence of "affirmative action", i.e., to affirmatively provide opportunities, not results, to the minority community. The City of Richmond has numerous agencies and services that provide such outreach to the minority community for which they are to be commended. Virginia was the first

state to have a Department of Minority-Owned Enterprises to provide education and managerial assistance to minorities.

However, a set-aside program is simply a quick fix that does not address the true needs of the minority business community.[11] Worse, they are nothing more than a racial quota and as such, are morally repugnant in a society professing to treat everyone as individuals rather than classifying them by the color of their skin. Such programs are even objected to by minorities who regard the preferential treatment as stigmatizing. As Professor Thomas Sowell wrote in *Black Education, Myths and Tragedies* 292 (1972):

> What all the arguments and campaigns for quotas are really saying, loud and clear, is that black people just don't have it, and that they will have to be given something in order to have something. The devastating impact of this message on black people —particularly black young people—will outweigh any few extra jobs that may result from this strategy.

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[11] *See also* P. Bell, *Blacks Must Take Responsibility For Their Own Lives*, 5 Lincoln Review, Summer 1984, at 39; P. Perlmutter, *Minority Group Responses To Prejudice & Discrimination*, 8 Lincoln Review, Winter 1988, at 21; C. Pendleton, *Affirmative Action & Individual Freedom*, 7 Lincoln Review, Summer 1986, at 23; J. Parker, *"The Time Has Come To Move Decisively Toward A Truly Color Blind Society,"* 6 Lincoln Review, Summer 1985, at 1.

CONCLUSION

This Court should reject the City's argument for what it is: fuzzy thinking and statistical voodoo to justify a politically motivated racial spoils system that is morally wrong, violates fundamental notions of fairness, and denies persons equal protection of the law. Competitive bidding in the contracting process is quintessentially nondiscriminatory.

In affirming the court below, this Court would do well to heed the suggestion of Professor William Van Alstyne:

> [O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.

Van Alstyne, *Rites of Passage: Race, the Supreme Court and the Constitution*, 46 U. Chi. L. Rev. 775, 809-810 (1979).

Respectfully submitted,

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June 8, 1988

* Counsel of Record

APPENDIX

SURVEY OF BLACK-OWNED FIRMS: RICHMOND, VA.

TOTAL OF BLACK-OWNED FIRMS:	1,563
Agricultural services, forestry, fishing, and mining	12
Construction	144
Manufacturing	12
Transportation & public utilities	98
Wholesale trade	2
Retail trade	354
Finance, insurance, & real estate	106
Selected services	690
Industries not classified	145

SOURCE: U.S. BUREAU OF THE CENSUS, 1982 Survey of Minority-Owned Business Enterprises: Black 88 (1985).

No. 87-998

Supreme Court, U.S.
FILED
JUN 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

—o—

CITY OF RICHMOND,

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

—o—

**ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

—o—

BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION

—o—

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No. 87-998

In The
Supreme Court of the United States
October Term, 1987

CITY OF RICHMOND,
Appellant,

v.

J.A. CROSON COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation (MSLF or the Foundation) respectfully submits this brief amicus curiae on behalf of its members.[1]

[1] MSLF has obtained the written consent of the Appellee. The Appellant has given its oral consent, and its written consent shall be filed with the Clerk of the Court immediately upon its receipt by amicus.

INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, private property rights, and the free enterprise system. The Foundation's members many of whom include public and private employers, many of which have affirmative action plans. MSLF has an extensive background and expertise in civil rights litigation.[2]

The Foundation and its members are deeply concerned about any further erosion of the limits on affirmative action programs instituted by state and local governmental entities. Affirmative action programs are constitutionally permissible only because of our country's unfortunate history of discrimination. These programs must be closely tied to such discrimination and, consequently, have some reasonable and easily discernable limiting principles under the Fourteenth Amendment. The Fourth Circuit Court of Appeals' ruling correctly identifies this Court's decision in *Wygant v. Jackson Board of Education*, 476 U.S. 267

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[2] MSLF was counsel of record in both *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and *Johnson v. Transportation Agency, Santa Clara County*, — U.S. —, 107 S. Ct. 1442, 94 L.Ed. 2d 615 (1987). In addition, The Foundation has participated as counsel or amicus in many cases defining the scope and application of the Civil Rights Acts and the Fourteenth Amendment. *E.g., Marsh v. Board of Education*, 581 F. Supp. 614 (E.D. Mich. 1984), *aff'd*, 762 F.2d 1009 (6th Cir. 1985), *vacated and remanded*, — U.S. —, 106 S. Ct. 2240, 90 L.Ed.2d 688 (1986); *NAACP v. City of Detroit*, 591 F. Supp. 1194 (E.D. Mich. 1984), *reversed and remanded*, 821 F.2d 328 (6th Cir. 1987); *AFSCME v. State of Washington*, 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd*, 770 F. 2d 1401 (9th Cir. 1985), *reh'g denied*, 813 F.2d 1034 (9th Cir. 1987).

(1986) as providing those limiting principles, and has properly applied it.

The *Wygant* decision's importance is twofold. First, it finds any racial classification to be subject to strict scrutiny. This standard applies whether the purported justification is beneficent or not, as the Fourteenth Amendment makes no such distinction. Second, *Wygant* requires the state or local governmental entity creating the plan to make findings of its own discriminatory conduct. In other words, the actor seeking to use a racial preference for remedial purposes, may do so only to remedy its *own* past misconduct. These requirements prevent affirmative action plans from being used in ways which are not consistent with their purpose; that is, to eradicate past discrimination.

MSLF and its members urge this Court to affirm the Fourth Circuit's decision, and hold that the *Wygant* strict scrutiny standard applies to affirmative action programs created by state and local governments.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amicus curiae adopts the statement of the case and the statement of the facts as set out in the Appellee's Brief.

SUMMARY OF ARGUMENT

In this case, the Foundation seeks to prevent this nation's civil rights law from being twisted into a blank check for special entitlements and partisan politics. The Fourteenth Amendment requires limiting principles to be placed on affirmative action programs.

As recognized by earlier decisions of this Court, most notably *Wygant*, racial preferences and classifications are always subject to "strict scrutiny" review. This is the case whether the classification disadvantages a group which has been traditionally discriminated against or not. To be upheld, such classifications must be necessary in order to achieve a compelling governmental interest.

While the eradication of discrimination is such an interest, mere racial balance in a given industry or sector of society is not. Therefore, this Court has imposed a requirement of "findings" upon state and local governmental entities seeking to use racial criteria in the award of public benefits, goods, or services. The entity creating the program must identify, by convincing evidence, its own past misconduct. Any findings Congress may have made are inadequate to ensure that such discrimination has occurred locally. Furthermore, the use of congressional findings may lead to anomalous or unjust situations, such as the one before this Court, where the relative benefits and burdens between individuals are readjusted without any regard for past circumstances.

Many state and local governmental entities throughout the country have adopted equally onerous and oppres-

sive affirmative action plans, equally devoid of concrete findings or any other defensible basis. The problem is widespread, and shows no signs of abating. The instant case involves a program indicative of those adopted nationwide, suffering from the same deficiencies as those identified by this Court in *Wygant*.[3] The ordinance is not narrowly tailored to the achievement of a compelling governmental interest. As such, this case presents this Court with an opportunity to confirm that these principles are applicable to every state and local governmental entity which takes it upon itself to make distinctions amongst its citizens on the basis of their race and sex.

It is essential that this Court make clear that affirmative action plans in this country are limited to those circumstances which justify their existence. If naked racial preferences based upon nothing more than political expedience are permissible, then the integrity which should be the hallmark of the nation's civil rights laws shall be little more than a hollow word, engendering not praise, but scorn and contempt.

———o———

[3] The "Report of the Minority Business Legal Defense and Education Fund on Minority Business Enterprise Programs of State and Local Governments," indicates that at least 192 state and local governments have affirmative action plans. The Report is available from the Academy for State and Local Government, 444 North Capitol Street, N.W., Suite 349, Washington, D.C. 20001.

ARGUMENT

I. THE APPROPRIATE STANDARD OF REVIEW FOR AFFIRMATIVE ACTION PROGRAMS IS THE "STRICT SCRUTINY" RULE ARTICULATED BY THIS COURT IN WYGANT v. JACKSON BOARD OF EDUCATION

The Fourteenth Amendment prohibits invidious discrimination on the basis of race, by state and local governments.[4] "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 (1986), *quoting, University of California Regents v. Bakke*, 438 U.S. 265, 291 (1978) (Powell, J., concurring).[5] "The Court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Wygant*, 476 U.S. at 273, *citing, Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), *Bakke*, 438 U.S. at 291-299, and *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

In reconsidering this case on remand, the Fourth Circuit Court of Appeals found the Richmond plan to be invalid under the Equal Protection Clause of the Fourteenth

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[4] "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, sec. 1.

[5] Although acts which discriminate on the basis of sex are not subject to quite as strict a scrutiny as those based on race, this Court has recognized that "the burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an 'exceedingly persuasive justification' for the challenged classification." *Kirchberg v. Feenstra*, 450 U. S. 455, 461 (1981).

Amendment. The Court of Appeals correctly noted that, "[t]he very infirmities which marked the preferential provision in *Wygant* are present in this case." *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, 1357 (4th Cir. 1987), *prob. juris. noted*, — U.S. —, 108 S. Ct. 1010, 98 L.Ed.2d 976 (Feb. 22, 1988).[6] This case is the most recent of a long line of cases which this Court has used to define the parameters of permissible affirmative action programs. The most elusive objective has, until recently, been that of formulating a workable and reasonable limiting principle for affirmative action programs. In *Wygant*, this Court articulated such a principle.

> The plurality opinion by Justice Powell held that:
>
> (a) In the context of affirmative action, racial classifications must be justified by a compelling state purpose, and the means chosen by the state to effectuate that purpose must be narrowly tailored;
>
> (b) Societal discrimination alone is insufficient to justify a racial classification; and,
>
> (c) If the purpose is to remedy prior discrimination, to be constitutionally valid there must be a factual determination that there is a strong basis in evidence for the conclusion that remedial action is necessary.

These limiting principles are both sensible and practical. And it is with this yardstick that any government-imposed affirmative action plan must be evaluated.

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[6] *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), concerned a collective bargaining agreement between the Board and the teachers' union, which immunized minority teachers from layoffs. Although layoffs were governed by seniority, this was qualified by a provision stating that at no time could there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In addition, the percentage minority teachers had to equal the percentage of minority students. As a result, non-minority teachers with less seniority were retained.

II. THE PROGRAM MUST BE NARROWLY TAILORED TO THE ACHIEVEMENT OF A COMPELLING GOVERNMENTAL INTEREST

This "strict scrutiny" standard has two prongs, both of which must be met, if the governmental action is to be sustained. Government-created affirmative action programs "must be justified by a compelling governmental interest," and the means must be "narrowly tailored to the achievement of that goal." *Wygant*, 476 U.S. at 274. Thus, though this scrutiny is "not 'strict in theory and fatal in fact,'" *Bakke*, 438 U.S. 362 (opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment and dissenting in part), it is nonetheless so stringent as to demand that no race-based preference may be sustained without a justification of the highest order. Such a justification is entirely lacking in this case.

"Discrimination or segregation for its own sake is not, of course, a constitutionally permissable purpose." *In re Griffiths*, 413 U.S. 717, 721 n.8 (1973) (citation omitted). More specifically, "quotas merely to attain racial balance are forbidden." *United States v. Wood, Wire and Metal Lathers International Union, Local Union No. 46*, 471 F.2d 408, 413 (2d Cir. 1973). The same principle applies to quotas based upon sex.[7] While the end to racial

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[7] "Where, as here, the state's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender-classifies and therefore carries with it the baggage of sexual stereotypes, the state cannot be permitted to classify on the basis of sex. And this is doubly so where the choice made by the state appears to redound, if only indirectly, to the benefit of those without need for special solicitude." *Orr v. Orr*, 440 U.S. 268, 283 (1979).

discrimination is a recognized justification, there is absolutely no showing as to the specific nature and extent of such discrimination for which a remedy is needed. Rather, the only discernible governmental interest appears to be the political benefits to be reaped from the set aside program. This falls far short of the "compelling interest" required by the Constitution.

III. THE CITY MUST MAKE FINDINGS OF ITS OWN PAST DISCRIMINATION PRIOR TO INSTITUTING ANY AFFIRMATIVE ACTION PROGRAM

To demonstrate the presence of a compelling interest, "the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant*, 476 U.S. at 274. This Court "never has held that societal discrimination alone is sufficient to justify a racial classification." *Id.* This is because, "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 276.

The requirement of findings is not a formal or technical one. It serves as a limiting principle, and also makes sure that the alleged discrimination is tangible and concrete. A state or local government "must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination." *Id.* at 277. Here, the City put forward no evidence of any kind, let alone evidence that the non-minority contractors or subcontractors against whom the quotas will operate

have been guilty of discriminatory practices. This complete failure to attempt to constitutionally justify its actions must raise serious doubts as to the City's true motives in adopting the plan.

The necessity of particularized findings by the governmental entity is also extremely sound from a public policy perspective. It prevents state and local governments from seeking to use these programs as a means of giving special entitlements to certain key constituencies. It defeats ill-conceived or improper attempts to attack entire industries, such as construction contractors, on the basis of generalized charges of "discrimination." The Courts of Appeals have found this rule to be extremely practical, and have used it in every such program reviewed but one since the *Wygant* decision was issued.[8]

The rule does not create a situation where a private party must incriminate himself before affirmative action plans may be instituted. If a government wishes to redress discrimination on the part of one or more private parties, the civil and criminal provisions of the Civil Rights Acts have, over the years, proven equal to the task. If the government is concerned about its *own* past or present misconduct, it must address that wrongdoing with

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[8] *J. Edinger & Son, Inc. v. City of Louisville*, 802 F.2d 213 (6th Cir. 1986); *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987), *prob. juris. noted*, — U.S. —, 108 S. Ct. 1010, 98 L.Ed.2d 976 (Feb. 22, 1988) (No. 87-998); *Michigan Road Builders Ass'n v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3806 (May 11, 1988) (No. 87-1860). The sole exception is *H.K. Porter Co., Inc. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3462 (Nov. 23, 1987) (No. 87-1001).

a program which puts the primary burden upon itself, the illegal actor, and be narrowly tailored to minimize the imposition upon innocent third parties.

Without this requirement, whole segments of the society may be indicted and convicted of discrimination *in absentia*, as was the case here. The City Council concluded there had been rampant discrimination in the construction industry, and imposed a judicial-type remedy without any prior notice to contractors, or the taking of any evidence from them. The imposition of judicial remedies without proper judicial process is extremely offensive to the principles of American government and concordant democratic values.

The City cannot impose minority participation "goals" or other forms of race/gender preferences, without a finding of the City's own culpability. Judicial remedies are the only avenue available if the City wishes to redress any perceived wrongdoing on the part of the contracting industry as a whole, or a substantial number of individual contractors. Though it may be difficult to create a "bright line" rule as to how findings are to be made, and when they are sufficient, this is no different from the sort of evidentiary assessments which the courts are called upon to make every day. Furthermore, in this case, *no* attempt to make adequate findings was made, and the possibility of difficult cases in the future ought not deter this Court from firmly rejecting a program which is completely devoid of constitutional justification. There have been no findings, and in their absence the race/gender provisions of the program violate the Fourteenth Amendment.

Race and gender preferences, such as those in the present case, are never constitutionally permissible when they are transparently designed to assure certain preferred groups a hypothetical share of public moneys. Furthermore, the only possible basis of this program is the rejected concept of "societal discrimination." A generalized conclusion about societal discrimination lacks the specificity necessary to demonstrate a compelling state interest in excluding nonminority subcontractors from the majority of contracts solely on the basis of race and sex.

Because there have been no findings of intentional discrimination, no compelling state interest arises. Therefore, the ordinance violates the Equal Protection Clause of the Fourteenth Amendment. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976). With no findings, the City cannot claim that the ordinance is a remedy. It therefore becomes, on its face, an arbitrary and capricious race and sex-based action constituting an equal protection violation.

IV. NATIONAL FINDINGS MADE BY CONGRESS CANNOT SUFFICE TO JUSTIFY AFFIRMATIVE ACTION PROGRAMS BY STATE AND LOCAL GOVERNMENTS

Even assuming that the national findings made by Congress over a decade ago in the passage of the Public Works Employment Act (PWEA) retain any validity, they are inadequate to justify state and local governmental affirmative action plans. In *Fullilove v. Klutznick*, 448 U.S. 448 (1977), the Supreme Court upheld the PWEA as constitutional, but Justice Powell cautioned, "[t]he degree of specificity required in the findings of discrimination

and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body." *Id.* at 515-516 n.14 (Powell, J., concurring).

The City cannot rely upon whatever minimal findings Congress made when it enacted the PWEA over a decade ago. The findings of societal discrimination underlying Congress' enactments reflect an assessment of a *national* program, based upon the country taken as a whole. It does not follow, logically or otherwise, that those findings as to the nation's generalized condition are equally applicable in a specific locality such as Richmond. "In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant*, 476 U.S. at 276. The City has an affirmative obligation to determine for itself the permissibility of this sort of racial classification. Congress has not relieved state and local governments of their constitutional obligations, nor can it do so.

This is underscored by the *Wygant* decision's rejection of "societal discrimination" as a basis of any government-imposed affirmative action plan. The Court of Appeals in its second decision in this case said it best:

> National findings do not alone establish the need for action in a particular locality. If they did, the *Wygant* Court's rejection of societal discrimination would be undercut. For a locality to show that it enacted a racial preference as a remedial measure, it must have had a firm basis for believing that such action was required based upon prior discrimination by the locality itself. . . . Localities cannot disregard the line between remedial measures and political transfers by adopting the *Fullilove* program as though it were boilerplate.

Croson, 822 F.2d at 1359-1360.

It is essential that state and local governments be held accountable for their discriminatory racial classifications. "[A] municipality that wishes to employ a racial preference cannot rest on broad-brush assumptions of historical discrimination." *Id.* at 1357. Furthermore, the nation's civil rights laws should not be permitted to be used as a thinly-veiled excuse for a new political spoils system:

> "If this plan is held to be valid, then local governments will be free to adopt sweeping racial preferences at their pleasure, whether those preferences are legitimate remedial measures or bald dispensations of public funds and employment based upon the politics of race. It is precisely to guard against this latter abuse that the *Wygant* requirement of particularized findings is essential.

Id. at 1357-1358.[9]

The Fourth Circuit expressed it best when it succintly stated, "[i]f this plan is supported by a compelling governmental interest, then so is every other plan that has been enacted in the past or that will be enacted in the future." *Id.* at 1360. It is this slippery slope with which this Court is currently confronted.

———o———

[9] "Moreover, respondents have never suggested—much less formally found—that they have engaged in prior, purposeful discrimination against members of each of these minority groups." *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, 1361 (4th Cir. 1987), *quoting Wygant*, 476 U.S. at 284 n.13. "A record of prior discrimination against blacks by a governmental unit would not justify a remedial plan that also favors other minority races." *Id.* at 1361. Again, specific findings, constituting a firm basis, are the prerequisite for this type of program.

CONCLUSION

The limiting principles articulated by this Court in *Wygant* are a workable and reasonable way to determine the parameters of permissible affirmative action plans. Without such limits, affirmative action will become a farce, recognized as little more than a politically expedient redistribution of wealth under the guise of eradicating discrimination. MSLF and its members urge this Court to ensure the continued viability of affirmative action in the United States, by affirming the decision of the Court of Appeals.

> [N]o man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to introduce in its stead universal distrust and distress.[10]

Dated this 8th day of June, 1988.

Respectfully submitted,

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10 *The Federalist, No. 78* (A. Hamilton).

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No. 87-998

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

CITY OF RICHMOND,
Appellant,

v.

J. A. CROSON COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF SOUTHEASTERN LEGAL FOUNDATION, INC. IN SUPPORT OF APPELLEE

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June 1988

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J. A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

INTEREST OF AMICUS

The Southeastern Legal Foundation, Inc. ("Southeastern") submits its brief *amicus curiae* in this case. The parties have consented to the filing of this brief and their consent letters have been filed with the Clerk of this Court.

Southeastern is a non-profit corporation organized in 1976 for the purpose of advancing public interest viewpoints in adversarial proceedings involving significant issues. Dedicated to economic and social progress through the equitable administration of law, Southeastern represents the views of its supporters who believe the rights of all persons should be properly protected and balanced in the courts. Toward that end, Southeastern has participated as *amicus curiae* in a number of cases before this Court for the past twelve years, including *Common Cause v. Schmitt*, 455 U.S. 129 (1982); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982); *South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida*, 723 F.2d 846 (11th Cir. 1984), cert. denied, 469 U.S. 871 (1984); and *Aetna Life Insurance Company v. Lavoie*, 475

U.S. 813 (1986).

Southeastern has filed numerous *amicus curiae* briefs in the federal courts at all levels expressing its opposition to racial preferences. Southeastern submitted its views in *United Steel Workers of America v. Weber*, 563 F.2d 216 (5th Cir. 1977), reversed 443 U.S. 193 (1979); *Cramer v. Virginia Commonwealth University*, 586 F.2d 297 (4th Cir. 1978); and *S. J. Groves and Sons Company v. Fulton County, Georgia*, Civil Action File Number C82-1895A (U.S.D.C. N.D.Ga.). In November, 1987, Southeastern represented two non-minority sub-contractors in the United States District Court for the Eastern District of North Carolina, challenging the administration of the minority and disadvantaged business enterprise provision of the Surface Transportation Assistance Act of 1982 by the North Carolina and United States Departments of Transportation. *Joe Carpenter, et al. v. Elizabeth Dole, et al.*, Civil Action File Number 85-527-CIV-5 (U.S.D.C. E.D.N.C.).

The issue of the level of findings necessary to justify the implementation of remedial racial preference programs, addressed in this brief, is of crucial importance to all citizens and local governments throughout the United States.

STATEMENT OF THE CASE

Amicus adopts the statement of the case contained in the brief on behalf of Appellee, J. A. Croson Company.

SUMMARY OF ARGUMENT

In order to utilize racial preferences for remedying the present effects of past discrimination, a governmental entity must have a strong factual basis for such action. In concluding that the program challenged in this case was insufficient on this and other points, the Court of Appeals correctly applied decisions of this court such as *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), which requires a finding of discrimination by the governmental entity seeking to utilize the racially preferential criteria.

In arguing that the necessary factual predicate can be established by conclusory allegations of racial discrimination by private parties, and in arguing that general population statistics may be utilized to establish discrimination, Appellant overlooks the requirements set forth in decisions of this Court for actual proof of discrimination.

In determining whether there has been discrimination in the awarding of construction contracts by a city, it is insufficient merely to compare the number of contracts awarded to minority firms with the percentage of minority citizens in the general population. Decisions of this Court, several circuit courts rendered since *Wygant*, and other authorities all reject reliance on general population statistics for this purpose.

There are at least four reasons for not allowing proof of discrimination, in the context of a factual predicate for racial preferences in the awarding of public contracts, through the use of general population statistics. Among these reasons are the inherent unreliability of such information, the possibility for political abuse of such programs, and an inherent inconsistency between utilization of such data and the objective of narrowly tailoring the use of racially preferential criteria to an identifiable problem of racial discrimination.

ARGUMENT

I. INTRODUCTION

In this brief *amicus* Southeastern Legal Foundation, Inc. will deal primarily with the issue of whether there was a sufficient factual basis for utilization of racial preferences by the City of Richmond in its minority business utilization ordinance. *Amicus* will argue that the ordinance invalidated by the Court of Appeals was, as that court held, fatally flawed because of its reliance on general population statistics to establish the existence of racial discrimination.

II. BEFORE A GOVERNMENTAL ENTITY CAN UTILIZE RACIAL PREFERENCES FOR AWARDING PUBLIC CONTRACTS, THERE MUST BE FINDINGS OF PAST DISCRIMINATION SO AS TO DEMONSTRATE A COMPELLING STATE INTEREST IN THE USE OF RACIAL CRITERIA

A. *Appellant's Allegations of Discriminatory Conduct*

It is indisputable that a governmental entity, prior to utilizing racial preferences in the context of public contracts or elsewhere, must have a factual predicate for such actions, in order to withstand legal scrutiny. *E.g. Fullilove v. Klutznick*, 448 U.S. 448 (1980). This requirement is applicable to Congress, as in *Fullilove*, and equally, and perhaps more so, to lower level political entities such as municipalities. See *Regents of University of California v. Bakke*, 438 U.S. 265, 309 (1978).

As stated by one commentator, however, "requiring that discrimination be identified is one thing; describing what remediable discrimination must look like is quite another." Days, *Fullilove*, 96 Yale Law Journal 453, 481 (1987). The instant case presents the fundamental question of the minimal amount of

findings of racial discrimination which should be required of a municipality prior to utilization of racial preferences. *Amicus* submits that the Fourth Circuit Court of Appeals correctly described the Richmond situation in the following language: "If this plan is held to be valid, then local governments will be free to adopt sweeping racial preferences at their pleasure, whether those preferences are legitimate remedial measures or bald dispensations of public funds and employment based on the politics of race." *J. A. Croson Company v. City of Richmond*, 822 F.2d 1355, 1357-58 (4th Cir. 1987).

In this brief *Amicus* contends that the analysis of this issue by the court below was consistent with that required by previous decisions of this Court, such as *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842 (1986).

It is revealing to examine closely what Appellant would have this Court adopt as a standard for measuring the sufficiency of findings of racial discrimination. From an examination of Appellant's arguments it appears that the City's fundamental contention is as follows. In determining whether there has been discrimination so as to justify utilization of racial preferences, the relevant inquiry is to compare the number of minority firms actually receiving prime contracts from the city—noticeably, there is a glaring failure to discuss the amount of *subcontracted* work going to minorities—with the minority population percentage in the City. Appellant's brief, pp. 3, 21 and 40.

This reliance on general population statistics to establish discrimination, while sometimes appropriate in the context of unskilled employment, is ill-founded in a determination of whether there has been discrimination, either public or private, in the awarding of construction contracts by a municipality.

Appellant's brief also assumes the existence of certain facts which, if part of the record, are present only in the form of conclusory allegations. For example, Appellant's analysis begins with the conclusion that:

> In a city that is half minority and that awards $124 million in city construction contracts over a five-year period, one would expect minority businesses to be awarded much more than two-thirds of one percent of those contracts, absent discrimination. Because the number of minority contractors in Richmond was "quite small," J.S. App. 7a, this discrimination must have been in the industry itself. Appellant's Brief, pp. 20-21.

Appellant thereafter repeatedly contends that the Richmond ordinance was "predicated on identified, purposeful discrimination in Richmond's construction industry that had caused an extraordinary racial imbalance in the awarding of city construction contracts," Appellant's brief, p. 40, and that the "disparity between the percentage of city contracts awarded to minority businesses and the percentage of minorities in Richmond — less than one percent versus fifty percent — is so enormous that by itself it creates a strong inference of discrimination." *Id.* at p. 20. Appellant also relies upon evidence as to low or non-existent minority membership in certain trade groups whose members are likely to participate in bidding for the City of Richmond's construction contracts. *Id.* at pp. 4-5. From these factors Appellant assumes — and asks this Court to assume — that discrimination in the private sector is the cause of low minority representation among firms receiving construction contracts from the City of Richmond.

This assumption, the first and weakest link in Appellant's argument, is fundamentally an attempt to persuade this Court to decide this case on the basis of factual determinations which are not supported by the record of proceedings, either in the lower courts or

in the Richmond City Council. Appellant contends that the *Wygant* requirement of discrimination "by the government unit involved", *Wygant*, 106 S.Ct. at 1847, is not applicable. Appellant's brief, pp. 33-41. Appellant also suggests that the City of Richmond has been a "passive participant" in discrimination alleged to have been engaged in by private parties. Appellant's brief, p. 40. In fact, however, the evidence of that discrimination, upon which Appellant seeks to rely, is, first an assumption by Appellant, and, as the Court of Appeals noted, in the form of conclusory allegations and statistical data which are similarly not probative. *Croson*, 822 F.2d at 1358.

B. ***The Applicable Legal Standard***

Appellant's argument itself demonstrates the urgent need for definitive standards and guidance as to what factual predicate must exist before a governmental body can utilize racial preferences in awarding public contracts and for other purposes. Moreover, the existence of an increasingly large number of state and local enactments of this type, noted by Appellants and in briefs by *amici* such as the National League of Cities, also demonstrates the need for such guidance from this Court in establishing standards for judicial review of racially preferential legislative enactments.

In the final analysis, Appellant's argument overlooks the burden of proof which this Court has held applicable to governmental use of racial criteria for remedial purposes.

This Court has often held that the burden is on the governmental entity seeking to utilize racial preferences to establish that it passes the two-pronged test set forth in *Fullilove*, *Wygant*, and elsewhere. This burden of proof is entirely different from the situation in which there has been a definitive finding of past discrimination, as in *U.S. v. Paradise*, ____ U.S. ____, 107 S.Ct. 1053 (1987). As

noted by Justice Stevens' concurring opinion in that case, where there has been a finding of illegal discrimination, the burden of proof is "precisely the opposite of that in cases such as *Wygant* ... and *Fullilove . . . which did not involve any proven violations of law.*" *Id.* at 1078 (emphasis added).

The description of *Fullilove* as a situation which did not involve any proven violations of law is also applicable here, where the evidence of discrimination relied on by Appellant is similar to *Fullilove.* This case falls clearly in the category of cases in which there are no proven violations of law. Appellant's numèrous references to alleged discriminatory conduct by private persons should not be allowed to substitute for actual proof of discrimination required by decisions of this Court.

III. GENERAL POPULATION STATISTICS ARE AN INADEQUATE BASIS FOR SHOWING THE EXISTENCE OF DISCRIMINATION REQUIRED BEFORE RACIAL PREFERENCES CAN BE UTILIZED IN AWARDING PUBLIC CONTRACTS

A. *Decisions of this Court*

The actions taken by the Richmond City Council, and Appellant's arguments, fundamentally rely upon the difference between the percentage of public contracts awarded by the City of Richmond to minority prime contractors, and the percentage of minority citizens in Richmond. *E.g.*, Appellant's brief, p. 20.

This reliance is clearly misplaced, in view of numerous decisions by this Court limiting the uses of general population statistics in proving racial discrimination. Two cases from the employment context are often cited to demonstrate the critical difference between the use of population statistics for demonstrating a racial

imbalance in jobs which require no special expertise (held appropriate in *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 339-40 (1977)) and the use of such statistics in attempting to prove discrimination in employment requiring special skills or training (held inappropriate in *Hazelwood School District v. U.S.*, 433 U.S. 299, 307-09 (1977)). This distinction was recently reiterated in *Johnson v. Transportation Agency, Santa Clara County*, ____ U.S. ____, 107 S.Ct. 1442, 1452 (1987).

Even more significant, in the context of this case, was the acceptance of this distinction in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 1847-48 (1986).

B. ***Post - Wygant Decisions of Other Circuit Courts***

The degree of skill and expertise required for an individual or firm to act as a prime contractor on construction projects clearly falls within the category of occupations requiring, for purposes of analyzing statistical data showing an under representation of minorities in the relevant group, a comparison of the *relevant* population, not the general population. Significantly, all of the circuits which have considered this question since *Wygant* have reached the same conclusion on the insufficiency of general population statistics for this purpose.

In *J. Edinger and Son, Inc. v. City of Louisville, Kentucky*, 802 F.2d 213 (6th Cir. 1986), *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987), and *Michigan Road Builders Association, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), the circuit courts held that before a governmental entity may employ an affirmative action program using racial or ethnic classifications, there must be factual evidence of real racial discrimination. Reliance upon the disparity between general population statistics and the level of

minority participation in public contracting is insufficient.

In *J. Edinger and Son, Inc. v. city of Louisville, Kentucky, supra*, the city appealed from a grant of summary judgment in favor of the businesses challenging the minority vendor ordinance for the city. On appeal the city challenged the district court's conclusion that there was an insufficient statistical basis to justify the racial classification imposed by the city of Louisville. The city argued "that the large discrepancy between the percentage of minority residents and the percentage of business conducted with minority owned businesses sufficiently demonstrates a need for the legislation." *Id.* at 215.

In rejecting the city's argument on this point, the Sixth Circuit identified several flaws in the findings relied upon by the City of Louisville. The court recognized that general population figures could be relied upon to determine whether racial discrimination had occurred in a particular area of the work force. *Id.* (citing *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983)). The use of general population statistics could be used where there is a long history of racial discrimination. This history of discrimination must be corroborated by numerous independent studies and reliance on recent statistics where applicants for government jobs come from the general populace.

Where, as in *J. Edinger and Son, Inc.*, the affirmative action program was directed toward increasing the level of minority participation in the award of city contracts, and not to increasing the level of minority participation in the work force, the court held that "a more appropriate analysis would have focused on the number of minority owned contractors in the county rather than the number of minorities *per se*." *Id.* The same flaw exists in the Richmond program.

Other similarities exist between the facts in *J. Edinger and Son, Inc.* and the case *sub judice*. The fatally flawed evidence relied upon by the City of Louisville as the justification for its MBE program is essentially the same as that relied upon by the City of Richmond. According to the Sixth Circuit, "the hearings of the Board of Alderman simply rehashed the statistical disparity between the population distribution and the business operation distribution. No other evidence of discrimination was presented." *Id.* The same insubstantial evidence also was presented to the Richmond City Council.

Additionally, the *Edinger* court found, "there is no showing that actual discrimination has stunted the development of minority businesses. There are a host of social, economic, personal, and demographic factors which may account for the statistical disparity." *Id.* at 216.

Appellant has failed to identify any specific instance of actual discrimination which has resulted in the stunted development of minority businesses in the Richmond area. Appellant's brief, pp. 20-21. "Even assuming defendant was able to show that societal discrimination has caused a disproportionately small number of minority owned contractors, this is still an insufficient basis for imposing a racially classified remedy against innocent people." *J. Edinger and Son, Inc.*, 802 F.2d at 216.

The holding in *J. Edinger and Son* was later followed in *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987). In this case the Plaintiffs successfully challenged the validity of San Francisco's affirmative action ordinance for minorities, women, and locally owned businesses in city contracting. In its order the Ninth Circuit emphasized the necessity of making findings of official discrimination before utilizing racial preferences. *Id.* at 932. As

in *Edinger,* reliance upon general population statistics was disapproved. *Id.* at 933-34. Also citing *Edinger,* the court held that "[c]ontract awards should reflect the pool of available contractors, *not* the city's ethnic makeup." *Id.* at 934 (emphasis in original).

In *Michigan Road Builders Association, Inc. v. Milliken,* 834 F.2d 583 (6th Cir. 1987), the court found that the Michigan legislature had relied upon insubstantial evidence to justify an affirmative action program. The legislature had "relied upon certain conclusory historical resumes of unrelated legislative enactments and proposed enactments, executive reports, and a state funded private study conducted in 1974." *Id.* at 590. If this type of evidence was found to be inadequate, the conclusory and speculative testimony offered to the Richmond City Council must surely be inadequate.

C. *Reasons for Not Utilizing General Population Statistics*

The inappropriateness of using general population statistics has also been recognized by Drew Days, former Assistant Attorney General for Civil Rights, who was the defender in the Supreme Court of the statute challenged in *Fullilove.* Days, 96 Yale L. J. at 481. While Mr. Days states that there is much that government at all levels can and should do to eliminate discrimination affecting minority owned businesses, he clearly recognizes the limits on utilization of statistics, particularly those dealing with general population figures, to show remediable discrimination:

> Although statistics play a necessary role in the inquiry, significant disparities between the percentage of minority members among all contractors as compared with the general minority population in a state or

> municipality, standing alone, would not provide a sufficient basis for the implementation of a set-aside program. *Id.*

Days notes the difference between the use of general population statistics for employment without special qualifications, and situations in which the employment requires "qualifications not possessed by the general population," in which decisions such as *Hazelwood, supra,* have rejected reliance on general population statistics. In language particularly applicable to this case, Mr. Days observed:

> Because government contracting falls into this latter category, the relevant question is whether there is a significant disparity between the percentage of minority contractors eligible to handle government contracts and their percentage representation among those actually bidding for or awarded such contracts. *Id.*

It is thus apparent that the Fourth Circuit's rejection of the city's reliance on general population statistics to show discrimination was entirely consistent with previous decisions of this Court, and with the views of at least one highly respected advocate of remedial racial preferences.

There are other defects in the statistical data relied upon by the City of Richmond, including the failure to consider the amount of work subcontracted to minority firms during the time period considered by the City. This omission, in and of itself, renders the City's findings suspect, because it may "seriously undercount" the amount of work which minority businesses have actually engaged in on city construction projects. See *Associated General Contractors of California v. City and County of San Francisco,* 813 F.2d at 933 (9th Cir. 1987).

The most fundamental defect, however, in the City's statistical data is the reliance on the general population statistics. As observed by the Court of Appeals, the "appropriate comparison is between the number of minority contracts and the number of minority *contractors*, taking into account other relevant variables such as experience and specialties. Showing that a small fraction of city contracts went to minority firms, therefore, does not itself demonstrate discrimination..." in view of the low number of minority owned contracting businesses in Richmond. *Croson*, 822 F.2d at 1359. (Emphasis by the Court).

The reasons for this virtually unanimous rejection of general population statistics in this context would appear to be at least four-fold.

First, such data is inherently unreliable, with respect to proving discrimination, because such statistical disparities may exist "completely unrelated to discrimination of any kind." *Wygant*, 106 S.Ct. at 1848.

Second, to the extent that the existence of such data confirms the existence of "societal discrimination," this Court's decisions make clear that this is an insufficient basis upon which a state or municipality can enact a program embodying racial preferences. *Id.* at 1847.

Third, reliance on population statistics could readily lead to political manipulation of programs aimed to assist minority businesses, particularly where the minority group being aided is politically powerful within the political subdivision seeking to utilize the perference. *Croson*, 822 F.2d at 1358-59.

Fourth, reliance on such data is inherently inconsistent with the judicially imposed limitations on utilization of racial criteria: to ensure that the means chosen extend no further than necessary.

At stated in *Fullilove*, 100 S.Ct. at 2775-76, there is a need for careful judicial review to ensure that a program utilizing racial criteria for a remedial purpose is "narrowly tailored to the achievement of that goal." In the absence of meaningful findings, it is virtually impossible to apply the Court's narrowly tailored test. See *J. A. Croson Company v. City of Richmond*, 779 F.2d 181, 202 (4th Cir. 1985) (dissenting opinion by Judge Wilkinson).

CONCLUSION

Amicus respectfully requests that this Court affirm the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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Supreme Court Of The United States

October Term, 1987

CITY OF RICHMOND,

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

On Appeal From
The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF THE ASSOCIATED SPECIALTY CONTRACTORS, INC., AMICUS CURIAE

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BRIEF OF THE ASSOCIATED SPECIALTY CONTRACTORS, INC., AMICUS CURIAE

This brief is being filed on behalf of the Associated Specialty Contractors, Inc., *amicus curiae*, in support of affirming the judgment of the Fourth Circuit Court of Appeals finding that the Richmond MBE Plan violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The Interest Of The Amicus Curiae

The Associated Specialty Contractors, Inc. is a national umbrella organization consisting of eight construction trade associations involved in various specialty areas of construction. The constituent members of the Associated Specialty Contractors, Inc. are (1) Mason Contractors Association of America, (2) Mechanical Contractors Association of America, (3) National Association of Plumbing, Heating and Cooling Contractors, (4) National Electrical Contractors Association, (5) National Insulation Contractors Association, (6) National Roofing Contractors Association, (7) Painting and Decorating Contractors of America, and (8) Sheet Metal and Air Conditioning Contractors National Association.

Representatives of local chapters of the National Association of Plumbing, Heating and Cooling Contractors and the National Electrical Contractors Association appeared at the Richmond City Council hearing on April 11, 1983, and spoke in opposition to the proposed MBE Program (J.A. 31-31; 32-35; 37-40).

The purpose of Associated Specialty Contractors, Inc. is to advance the common interests of the members of the eight constituent trade associations.

The interest of Associated Specialty Contractors, Inc. in the present litigation is (1) to protect the members of the constituent associations from being excluded from government contract markets on the basis of race or nationality, and (2) to preserve a truly competitive environment in the construction industry in order to provide a quality product at the lowest competitive cost.

The problems posed by Minority Business Enterprise Programs are not limited to the City of Richmond. As detailed in the appendices to the brief *amicus curiae* of the National League of Cities, et al., the reach of these programs is national in scope with a proliferating number of both state and local plans that affect the construction industry on a regular and constant basis.

Statement

The briefs of the parties and other *amici curiae* have adequately described the Richmond MBE Program and its application to the mechanical contractor that commenced this litigation, and they will not be repeated in this brief.

ARGUMENT

This Court has historically and understandably been extremely suspicious of governmental action or decisions made wholly on race-based distinctions. This Court has "consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality'". *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967) (quoting from *Hirabayshi* v. *United States*, 320 U.S. 81, 100 (1943)). In *Regents of University of California* v. *Bakke*, 438 U.S. 265, 291 (1978), this Court has stated that "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination".

The "exacting judicial examination" of race-based governmental distinctions has been held by this Court to involve two tests: "First any racial classification 'must be justified by a compelling governmental interest' [citations omitted]. Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal'". *Wygant* v. *Jackson Board of Education*, 90 L.Ed.2d 260, 268 (1986) (quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 491 (1980)).

I. No Compelling Governmental Interest Justifies The Richmond MBE Program Because There Was No Evidence Of Unlawful Racial Discrimination Either By Contractors In The Local Construction Industry Or By The City Of Richmond Whose Effects The Program Sought To Remedy

The "evidence" allegedly justifying the "compelling governmental interest" in adopting the Richmond MBE Program consists of a 41-page transcript of a hearing before the Richmond City Council. Summarized, that "evidence" consisted of three points: (1) Between 1978 and 1983 .67% of the city's construction contracts were awarded to minorities, whereas the population of the city is 50% minority (J.A. 43); (2) an association of general contractors and certain specialty contractor associations in the Richmond area had few minority members (J.A. 27, 34, 36, 39-40); and (3) two speakers who made conclusory remarks that there was general racial discrimination in the construction industry in Richmond, in Virginia and other parts of the United States.[1]

There was no other statistical evaluation, anecdotal evidence or any evidence at all that the City of Richmond had ever excluded any particular minority contractors from city construction work.

Whether there must be a "particularized finding" of racial discrimination "by the governmental unit involved", as required by the plurality opinion in *Wygant*, 90 L.Ed.2d at 270, or merely whether the government agency "must have a firm basis for determining

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[1] Councilperson Marsh stated that:

> I have been practicing law in the community since 1961, and I am familiar with the practices in the construction industry in this area, in the State and around the nation. And I can say without equivocation, that the general conduct in the construction industry in this area, and the state and around the nation, is one in which racial discrimination and exclusion on the basis of race is widespread.

(J.A. 41) City Manager Deese recounted his experience in Pittsburgh, Pennsylvania, where he observed "racial discrimination in the area of contracting" (J.A. 42). These conclusory comments are obviously entitled to no weight in determining whether the City of Richmond in fact discriminated against minority construction contractors and will not be further pursued in this brief.

that affirmative action is warranted", as required in the concurring opinion of Justice O'Connor in *Wygant*, 90 L.Ed.2d at 280, neither requirement is met by the meager evidence before the City Council in the late hours of April 11, 1983.

The .67% of city contracts awarded to minority construction contractors in the 1978-83 period reveals nothing about either racial discrimination in the construction industry in the Richmond area or racial discrimination practiced by the City of Richmond in excluding minority contractors from city construction projects. There are many nondiscriminatory barriers to successful entry into the specialty contractor industry. These include: specialized knowledge and experience in the trade; general knowledge in operating a successful business and in appropriate bidding methods and procedures; sufficient working capital and reserves; ability to meet bonding requirements; and establishment of a track record of successful execution of work to attract customers.

Many of these barriers do not exist in the context of employment discrimination cases where this Court on occasion has approved findings of discrimination based on a comparison between the percentage of unskilled minorities employed and the percentage of minorities in the general population of the appropriate standard metropolitan statistical area. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339-40, n.20 (1977). But cf. *Hazelwood School District* v. *United States*, 433 U.S. 299, 308, n.13 (1977), where the Court, even in an employment case, cautioned that where the job requires special qualifications the appropriate comparison was not to general population statistics but to the smaller segment of the population possessing the special qualifications.

But in the case of construction entrepreneurs, as opposed to unskilled employees, the appropriate inquiry is a comparison between the minority contractors awarded city construction jobs and the number of qualified minority employers in the standard metropolitan statistical area. And here the record is silent, except for the showing that there were very few minority employers who

were members of the associations appearing at the city council hearing.[2]

The ultimate inquiry in the case does not yield a definitive answer on this record. Why do there appear to be so few qualified minority subcontractors in the Richmond area? There was surely no particularized finding of racial discrimination either in the construction industry generally or by the City of Richmond in particular.[3]

One possible answer is that the nondiscriminatory barriers to entry into the construction industry previously identified in this brief may adversely impact minorities because of general past societal discrimination against minorities.[4] But the explicit teaching of the *Wygant* case is that past societal discrimination against minorities will not support a racial classification program for the obvious reason that a finding of such discrimination would "uphold remedies that are ageless in their search into the past and timeless in their ability to affect the future". *Wygant* v. *Jackson Board of Education*, *supra* at 270.

The facile assumption that construction contractors and their associations practice racial discrimination in the Richmond con-

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[2] Indeed, one of the opponents of the program noted at the City Council hearing that only 4.7% of construction firms in the United States were minority owned and that 41% of that number were located in California, Illinois, New York, Florida and Hawaii, leaving only 2.8% of all construction firms in the remaining 45 states being minority owned (J.A. 35).

[3] The City of Richmond and the *amici* supporting it make much over the lack of any argument by the opponents that there was no racial discrimination in the local construction industry. See, for example, App. Br., pp. 5-6, 15, 19, 23). The answer to this argument is that the City never made a *prima facie* case of racial discrimination in the local construction industry and there was, therefore, nothing to rebut. In addition, the representatives of the construction trade associations denied engaging in racial discrimination (J.A. 20, 38).

[4] By suggesting this possibility, the *amicus* does not embrace "societal discrimination" as the reason why there appear to be relatively few minority employers in the construction industry in Richmond in relation to the minority population. On the record of this case there is no proven explanation for the apparent phenomenon.

struction industry and in the construction industry generally, which lace the brief of Appellant and the *amici* supporting it, should not be accepted by the Court. The over decade-old Congressional findings of racial discrimination in the construction industry nationally supporting the set-aside program ultimately endorsed in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), say nothing about alleged racial discrimination in the construction industry in Richmond in 1983, and are woefully out of date on a national basis. Moreover, a recent decision by the United States Court of Appeals for the District of Columbia Circuit discloses that construction contractors and contractor associations may be totally innocent parties in a context where labor unions have been found liable for racial discrimination in the construction industry in the Washington, D.C. area. *Berger* v. *Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1435-1438 (1988).

Yet the target of the Richmond MBE Program is aimed squarely at nonminority construction contractors in the Richmond area based on outdated national data and the purest of assumptions of contractor liability for alleged racial discrimination in the construction industry in Richmond.

Unfortunately, the record in this case reeks of the "politics of race" and "political transfers" that the Court below condemned. *J.A. Croson* v. *City of Richmond*, 822 F.2d at 1358, 1360 (1987). Councilperson Richardson opened the hearing by stating that the purpose of the program was to "recycle" city dollars "back to minority businesses" (J.A. 12). One of the program's proponents spoke of an Oakland, California program that resulted in twenty-two million dollars "of investment and development within Oakland minority communities" (J.A. 19).

There is, of course, nothing wrong with the general sentiment that a particular group wants "a piece of the action". But when a locality having a 50% minority population seeks to achieve "a piece of the action" by mandating the exclusion of nonminority businesses from 30% of the locality's subcontractor construction business expressly to "recycle" city money to minority businesses, it has

erected a racial classification that is clearly condemned by the Equal Protection Clause of the Constitution.[5]

The decision of this Court in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), approving a federal law requiring a 10% set-aside to minority contractors on a particular spending program is clearly distinguishable from the present case.[6] In that case the Court stressed the special constitutional competence under the Spending Power and Section 5 of the Fourteenth Amendment of the Congress of the United States, "a co-equal branch" of the federal government, representing all districts and states of the country, to make findings of past discrimination against minorities, supported by congressional committees, the U.S. Civil Rights Commission and the General Accounting Office, resulting in narrowly tailored remedial relief based on racial classifications. 448 U.S. at 465-67; 472; 483; 499-502; 503-06).

Here, in contrast, the City of Richmond does not have the special authority and competence of the U.S. Congress and is obviously more capable of political manipulation to achieve "the bald dispensation of public funds and employment based on the politics of race". 822 F.2d at 1358.

II. The Richmond MBE Program Is Not Narrowly Tailored To Achieve A Remedial Goal

The City of Richmond also fails utterly to meet the second prong of the strict test for state and local programs mandating percentage set-asides for minority businesses based on racial classifications. It is not "narrowly tailored" to achieve the remedial goal. See *Wygant* v. *Jackson Board of Education*, 90 L.Ed.2d at 268.

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[5] The observations of Justices Rehnquist and Stewart in dissent in *Fullilove* v. *Klutznick*, 448 U.S. 448, 532 (1980), that approval of set-asides on the basis of race will lead to "notions of 'racial entitlement'" and the separate dissenting view of Justice Stevens in the same case that "members of the favored group will feel entitled to 'a piece of the action'" (448 U.S. at 536) have come to full fruition in this case.

[6] While *Fullilove* is distinguishable, the Associated Specialty Contractors, Inc. believes for many of the reasons expressed in this brief that *Fullilove* was fundamentally wrongly decided and invites the Court to reconsider that decision.

The basic flaw in the Richmond program, as well as many others throughout the United States, is that its framers simply took the criteria for "narrow tailoring" set out by Chief Justice Burger in the *Fullilove* case and attached them as "boilerplate" to the local program. As argued above, the Congressional set-aside approved in *Fullilove* was endorsed because it was Congressional action based on the Spending Powers and Section 5 of the Fourteenth Amendment and fortified by committee findings and other appropriate agencies of the federal government.

The automatic "tacking on" of the *Fullilove* "narrow tailoring" requirements to the Richmond MBE Program has ludicrous results. That Richmond, geographically situated in the southland of the United States, is protecting Eskimos and Aleuts from racial discrimination by giving them set-aside priorities is simply astounding. There was certainly no testimony at the City Council meeting about discrimination against Eskimos and Aleuts in the Richmond area for the obvious reason that they do not reside there. The only apparent reason for their inclusion is because they were included in the racial classifications approved in *Fullilove*. This Court in *Wygant*, however, expressly rejected a similar "undifferentiated" laundry list of racial classifications to be protected where it was not shown that the governmental entity had "engaged in prior, purposeful discrimination against *each* of these minority groups". 90 L.Ed.2d at 275, n.13 (emphasis added).

Similarly the waiver provision in the Richmond Program is wholly inadequate because it is expressly limited to "exceptional circumstances", and there is no administrative appeal mechanism to test the appropriateness of a denial of a waiver. The waiver is either granted or denied on the unreviewable fiat of the political administrator.

Finally,[7] the 30% set-aside figure is wholly arbitrary. None of the proponents of the measure gave any reasons why 30% was

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[7] In the interest of economy the *amicus* will not address other deficiencies in the "narrow tailoring" requirement inherent in the Richmond Program which have been adequately covered by other parties.

the appropriate number. As the Fourth Circuit held in this case, "The figure simply emerged from the mists". 822 F.2d at 1360.

The *post hoc* rationalization of the city and the *amici* supporting it is that the 30% figure is roughly half way between the percentage of minority contractors utilized by the City and the 50% minority population figure in Richmond, referring to a similar analysis by Justice Powell in the *Fullilove* case, 448 U.S. at 513-14. These *post hoc* rationalizations, however, miss the point that there must at least be a finding that 30% of the qualified Richmond contractors are minority owned. To the extent that number is less than 30% -- and all the evidence points to the fact that it is considerably less[8] -- the 30% set-aside is subject to abuse in that a small number of minority contractors will be sharing a comparatively large amount of city construction work, thereby reducing competition and increasing costs to the city and its taxpayers.

CONCLUSION

For all of the above reasons Associated Specialty Contractors, Inc., as *amicus curiae*, supports affirmance of the decision below.

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[8] See note 2, *supra*.

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No. 87-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J. A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF APPELLEE

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QUESTION PRESENTED

In 1983, the City Council of Richmond, Virginia adopted a set-aside plan for minority business enterprises ("MBEs") which required the City's prime construction contractors to reserve at least thirty percent of the total dollar value of each contract for MBE subcontractors. In October 1983, acting pursuant to the set-aside plan, the City terminated a construction contract with Appellee J. A. Croson Company ("Croson") on the ground that Croson had failed to comply with the plan. In the decision now on appeal, the Fourth Circuit Court of Appeals held that the set-aside plan constituted an unlawful racial preference and therefore the City's decision to terminate Croson's contract violated its rights to equal protection under the Fourteenth Amendment.

The question presented for decision is whether the City may adopt and enforce a racially preferential set-aside for MBE subcontractors when

a) the record is devoid of any evidence that there had been racial discrimination in the award of City contracts at any time in the relevant past; and

b) the sole justification offered for the set-aside is the City's desire to remedy the present effects of past societal discrimination against minorities in the construction trades.

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BRIEF *AMICUS CURIAE* OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF APPELLEE

CONSENT OF THE PARTIES

Both the appellant and the appellee have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons, be they members of a minority or the majority, and in assuring that every individual receives equal treatment under the law regardless of his or her race or religion.

Among its many activities directed to these ends, the Anti-Defamation League has in the past filed *amicus* briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in cases such as *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Police Patrolmen's Ass'n, Inc. v. Castro*, 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

The Anti-Defamation League has long opposed the use of racial preferences in a variety of contexts, taking the position that each person has a constitutional right to be judged on his or her individual merits, rather than as part of a particular racial or ethnic group. The minority set-aside plan adopted by the City of Richmond does not fall within any legitimate exception to this fundamental and constitutionally mandated principle. The statistical evidence presented below indicates that the relatively small number of minority business enterprises in the Richmond area may be the direct result of a long history of racial discrimination in the construction trades. There is no evidence, however, to suggest that the City of Richmond itself contributed to the situation by engaging in discrimination in the awarding of contracts. Furthermore, the racial preference enacted by the City is not narrowly tailored to remedy the discriminatory practices employed by others.

As this Court has repeatedly held, a racial preference that is not narrowly designed to remedy identifiable discrimination is necessarily unlawful. Such a preference is wholly at odds with the basic

constitutional principles that all persons are entitled to be free from discrimination on grounds of race, religion, creed, sex, or national origin, and that each person has a right to be judged on the basis of his or her own individual merit—not on the basis of the group to which he or she happens to belong. For these reasons, the decision below declaring the plan unconstitutional should be affirmed.

STATEMENT OF THE CASE

A. The Richmond Set-Aside Plan

In 1983 the City of Richmond, Virginia enacted a set-aside plan under which construction contractors receiving prime construction contracts from the City of Richmond were required to subcontract at least thirty percent of the dollar value of their contracts to minority business enterprises ("MBEs") unless the prime contractor was itself an MBE or the City waived the requirement. "Minority business enterprise" was defined as a business at least fifty-one percent owned and controlled by minority group members. Minority group members were defined as citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.

Before the set-aside was enacted, the City Council held a 1½-hour-long hearing on the issue. At that meeting, the Council heard evidence that black construction contractors had received approximately 0.67 percent of the City's construction contracts in the preceding five years. The Council also heard evidence that black construction contractors comprised an even smaller percentage of the construction contractors in the relevant market. The Associated General Contractors of Virginia, the American Subcontractors Association in the Richmond area, the Richmond chapter of the Professional Contractors Estimators Association, the Central Virginia Electrical Contractors Association, and the Virginia Chapter of the National Electrical Contractors Association had a total of 866 members of whom only 4, or approximately 0.46 percent, were black.

According to U.S. Census figures, the City's population was approximately 51 percent black and 47 percent white in 1980. In 1983, when the set-aside plan was adopted, Richmond had a black mayor and a black majority in its City Council.

B. Termination Of The Croson Contract

In September of 1983, four months after the adoption of the set-aside program, the City of Richmond advertised for bids to install plumbing fixtures in the City jail. In anticipation of submitting a bid, Croson asked for subcontracting bids on plumbing fixtures from both an MBE supplier and a non-MBE supplier. The non-MBE submitted a timely bid, but the MBE did not. Consequently, Croson used the bid provided by the non-MBE in calculating its bid to the City.

Croson won the contract and then asked the City for a waiver of the MBE requirement. Croson explained that the cost of plumbing fixtures amounted to seventy-five percent of the total contract, that it could find only one MBE plumbing fixture supplier, and that it did not consider that supplier to be qualified. The MBE, who still had not submitted a bid, learned of the waiver request and contacted a City official to oppose it. The City then rejected Croson's request and gave Croson ten more days to comply with the MBE requirement. During that interval, the MBE submitted to Croson a bid which was several thousand dollars higher than the competing bid that Croson had used in figuring its own bid to the City.

Croson again requested a waiver or, alternatively, an increase in the contract price to cover the increased cost of doing business with the MBE. The City rejected both requests, explaining that the MBE was qualified and that the bid price could not be increased. When Croson declined to agree to the MBE's terms, the City terminated its contract with Croson on the ground that Croson had not complied with the MBE requirement.

C. Proceedings Below

After the City told Croson that it had decided to re-bid the contract, Croson filed suit in federal court to challenge the minority set-aside plan. The district court rejected the challenge and a divided panel of the Fourth Circuit affirmed. *J. A. Croson Co. v. City of Richmond*, 779 F.2d 181 (4th Cir. 1985). This Court then granted *certiorari*, vacated, and remanded for consideration in light of *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), which

had been decided after the court of appeals decision. Following remand, a divided panel of the Fourth Circuit held the plan violative of the equal protection clause of the Fourteenth Amendment. *J. A. Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987). This appeal followed.

SUMMARY OF ARGUMENT

When it enacted the set-aside program at issue here, the Richmond City Council apparently assumed that any program purportedly patterned after the federal set-aside approved in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), would be permissible under the Fourteenth Amendment. *Fullilove*, however, did not give blanket approval to all MBE set-asides at all times and places and under all circumstances. On the contrary, *Fullilove* emphasized the need for a close examination of any program that allocates government contracts on the basis of race. *Amicus* believes that the appropriate test to employ in conducting such an examination is that set forth by the plurality opinion in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), which requires a demonstration that the racial preference in question is narrowly tailored to serve a compelling state interest.

The set-aside program at issue here does not meet this test. There is no evidence of past discrimination by the City of Richmond against MBEs in the award of public contracts that could be used to justify the preference as a remedial measure. Indeed, there is not even a statistical disparity between the percentage of MBEs in the relevant market and the percentage of City business awarded to MBEs.

The necessary "compelling state interest" cannot be found, as the City argues before this Court, in the City's desire to remedy the effects of societal discrimination against minorities in the construction industry. We assume that it is true, as the City contends, that the exclusion of blacks from entry-level jobs as craft workers has prevented the formation of a base of skilled workers from which minority-owned construction businesses would naturally develop. But *Wygant* properly holds that this type of societal discrimination is simply too amorphous to justify the government's use of racial preferences which discriminate against innocent third parties, while

at the same time benefiting individuals who were not themselves victims of discrimination.

Moreover, even if a desire to remedy societal discrimination could be deemed a compelling state interest, the set-aside at issue here would fail because it is not narrowly tailored to serve that interest. Under the City's own rationale, the set-aside would be lawful only if it were designed to correct the racial imbalance that currently exists in the ranks of qualified contractors by increasing the number of MBEs. Reserving thirty percent of the dollar value of City subcontracts for existing MBEs can hardly be considered narrowly tailored to the achievement of such a goal. Because the set-aside is not limited to new MBEs and does not provide any assistance for the formation of new enterprises, it is more likely to provide a preference to existing firms whose owners have managed to enter the market despite societal discrimination. Inasmuch as there is no evidence that existing MBEs have been discriminated against by the City of Richmond, the owners of such companies who are granted a preference by the set-aside cannot be considered victims. To give these owners a substantial preference in government contracting over other owners, solely on the basis of the color of their skin, is fundamentally at odds with the guarantee of equal protection set forth in the Fourteenth Amendment.

ARGUMENT

I. THE RICHMOND PLAN MUST BE CLOSELY SCRUTINIZED

The Richmond plan discriminates on the basis of race in at least two respects. First, white prime contractors such as Croson are subject to the MBE requirement, while minority prime contractors are not. Second, white subcontractors such as Croson's non-MBE supplier are denied equal access to City business while minority contractors are given preferential access.

The City must carry a heavy burden to justify the use of racial classifications in its set-aside program. "This Court has consistently repudiated [d]istinctions between citizens solely because of their ancestry as being odious to a free people whose institutions are founded upon the doctrine of equality." *Wygant*, 476 U.S. at 273 (opinion of Powell, J.) (internal quotations omitted), quoting in part from *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

While racial classifications are not *per se* illegal, this Court has consistently held that "'[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.'" *Wygant*, 476 U.S. at 273, quoting *Regents of University of California v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J., joined by White, J.) "'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure it does not conflict with constitutional guarantees.'" *Wygant*, 476 U.S. at 273-274, quoting *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (opinion of Burger, C.J.).

In *Wygant*, the plurality spelled out the two prongs of this examination. "First, any racial classification 'must be justified by a compelling governmental interest.'" 476 U.S. at 274, quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). "Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'" *Wygant*, at 274, quoting *Fullilove*, 448 U.S. at 480.

In its brief on appeal, the City urges the Court to reject the *Wygant* formulation, arguing that an intermediate level of scrutiny should be applied to any racial preference that was enacted out of a desire to remedy the effects of past discrimination. Although the precise formulation employed by the Court is not likely to affect the outcome of the decision in this case, *Amicus* believes it is critical that the Court emphasize once again that racial preferences cannot be allowed absent a clear and compelling justification. No matter how laudable the intentions of those who enacted it, a racial preference is still an extraordinary exception to the concept of equal protection embodied in the Fourteenth Amendment. Accordingly, such a preference should not be upheld absent a showing that it is narrowly tailored to further a compelling state interest.[1]

[1] The City's suggestion that the Court should not apply strict scrutiny to the preference at issue here is particularly inappropriate in light of the racial composition of the Richmond City Council at the time the set-aside was enacted. As Judge J. Skelly Wright noted in a 1980 law review article, where a majority of the decisionmakers are members of the racial group benefited by the preference "there is no *a priori* reason to assume that they are not acting out of prejudice or hostility... such programs should... be denied the presumptive validity granted programs instituted by the groups disadvantaged by them." Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. Chi. L. Rev. 213, 236 (1980). *See also* Ely, *The Constitutionality of Reverse Discrimination*, 41 U. Chi. L. Rev. 723, 739 n. 58 (1974).

II. The Set-Aside Plan Cannot Be Supported By The City's Desire To Remedy The Effects Of Past Societal Discrimination

When the test set forth in *Wygant* is applied to the present case, it is clear that the Fourth Circuit was correct in holding that the set-aside violated the Fourteenth Amendment. At the outset it is important to emphasize that the City does not contend that the set-aside was designed to remedy past discrimination against MBEs in government contracting. Nor could it do so. The record in this case indicates that when the plan was enacted, approximately 0.46 percent of the contractors in the relevant market were black; nevertheless, these contractors as a group were receiving 0.67 percent of the City's construction business.[2] These numbers may not be statistically significant. But to the extent they show anything, they demonstrate that the City was awarding contracts to MBEs at a rate which exceeded their proportionate representation in the construction industry.

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[2] It is clear that the proper comparison for purposes of determining whether a *prima facie* case of discrimination has been made is the percentage of minority contractors in the relevant market—not the percentage of minorities in the local population as a whole. See, *e.g.*, *J. Edinger & Son, Inc. v. The City of Louisville*, 802 F.2d 213 (6th Cir. 1986), where the Sixth Circuit relied on the absence of any proof of discrimination when such a comparison was made to strike down a set-aside plan similar to the one at issue here. The court in *Edinger* relied on this Court's opinions in *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977), and *Wygant*, 476 U.S. at 275, which held that "the proper comparison for determining the existence of actual discrimination by the school board [in hiring teachers] was 'between the racial composition of [the school's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.'" *See also* the article recently published by Drew S. Days III, professor at Yale Law School and former Assistant Attorney General for Civil Rights in the Carter Administration, who argued *Fullilove* on behalf of the United States, where he explained that "[a]lthough statistics play a necessary role in the inquiry, significant disparities between the percentage of minority members among all contractors as compared with the general minority population in a state or municipality, standing alone, would not provide a sufficient basis for the implementation of a set-aside program. . . . The relevant question is whether there is a significant disparity between the percentage of minority contractors eligible to handle government contracts and their percentage representation among those actually bidding for or awarded such contracts." Days, *Fullilove*, 96 Yale L.J. 453, 481 (1987).

What the City does argue is that the set-aside was an appropriate way of remedying the present effects of past discrimination throughout the construction trades. Craft unions, the City explains, traditionally excluded blacks from entry-level positions in the construction trades and failed to advance those few who were admitted. As a result, there have been relatively few blacks holding skilled jobs in the construction industry and even fewer who were able to rise through the ranks to become construction contractors. The City argues that because the set-aside plan encourages the formation of more MBEs, it is a legitimate way of eliminating the racial imbalance in the ranks of those who own contracting businesses created by this long-standing pattern of discrimination. In support of this argument, the City relies heavily on this Court's approval of a federal MBE set-aside program in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The analysis set forth in *Fullilove*, however, simply does not support the wide-ranging theory espoused by the City in this case.

Although the Court in *Fullilove* referred to the well-known history of racial discrimination in the construction trades, it did not approve the ten percent set-aside at issue there on the ground that government could use racial preferences in government contracting to remedy the effects of societal discrimination. On the contrary, the Court emphasized that Congress had enacted the set-aside in response to evidence of direct and continuing intentional discrimination against minority contractors in the award of public contracts. As the Chief Justice stated, Congress believed that the inordinately low percentage of federal contracts awarded to minority business enterprises resulted "*not* from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination. . . ." *Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.) (emphasis supplied). Thus, the federal program approved in *Fullilove* was designed to remedy purposeful and "identified discrimination against minority contractors," *id.* at 507 (Powell,

J., concurring), and was based on adequate evidence of such discrimination.[3]

In this case, as described above, the City concedes that there is no evidence that "capable and qualified minority businesses" were excluded from government contracting opportunities by intentional discrimination or by the effects of past discrimination. Instead, the City's claim is that discrimination within the industry has been so pervasive that relatively few capable and qualified minority businesses have been able to emerge in the Richmond area. While this may be true, it cannot be the basis of a government preference for existing MBEs.

In *Wygant*, the plurality specifically rejected the notion that a desire to remedy societal discrimination is sufficient to support a state's adoption of a racial preference, noting that the Court has always "insisted upon some showing of prior discrimination *by the governmental unit involved* before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant*, 476 U.S. at 274 (emphasis added). As the plurality further observed: "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant*, 476 U.S. at 276. "No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive." *Id.* (emphasis in original).

The City asks the Court to repudiate this reasoning and to hold that government contracts can be allocated on the basis of race whenever there is a showing that a particular group has been prevented by societal discrimination from competing for those contracts. The difficulty with the City's argument, as the plurality observed in *Wygant*, is that it could be used to justify virtually any type of racial preference. "In the absence of particularized findings,

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[3] *See also* Justice Marshall's concurring opinion, where he observed that "Congress had a sound basis for concluding that minority-owned construction enterprises, though capable, qualified, and ready and willing to work, have received a disproportionately small amount of public contracting business because of the continuing effects of past discrimination." *Fullilove*, 448 U.S. at 520.

a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant*, 476 U.S. at 276.

This Court has long held that the Constitution requires the government to allocate burdens and benefits without reference to the racial make-up of its citizens. Racial preferences that are narrowly tailored to remedy identifiable discrimination have been recognized as an exception to this rule. If the City's position were adopted, the exception would grow so large that it would obliterate the fundamental constitutional principle of even-handed treatment. The City has not offered any reason why this Court should make such a revolutionary change in the law.

III. The Set-Aside Plan Is Not Narrowly Tailored

Even if this Court were to reject the plurality opinion in *Wygant* and accept the City's argument that its desire to remedy the effects of societal discrimination is a compelling state interest, the City's thirty percent set-aside for MBEs would still be invalid. "Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant*, 476 U.S. at 280. There is no such fit here between the asserted purpose of the racial classification and the means chosen to effectuate it.

Again, a comparison with the set-aside approved in *Fullilove* is instructive. As described above, Congress enacted the program at issue in *Fullilove* in response to evidence of intentional discrimination against capable minority contractors in the awarding of public contracts. The ten percent set-aside enacted by Congress was designed to end that discrimination and perhaps to compensate the victims as well. The Court found the remedy to be sufficiently tailored to fall within the ambit of congressional discretion.

In making this determination, the Court emphasized both the temporary nature of the plan and the breadth of congressional power. The ten percent set-aside program was part of an emergency public works program in which the funds were to be spent within a year. As Justice Powell emphasized in his concurring opinion, the "set-aside is not a permanent part of federal contracting requirements. As

soon as the PWEA program concludes, this set-aside program ends. The temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate." 448 U.S. at 513. The Court also gave great weight to the fact that the set-aside had been enacted by Congress, "a co-equal branch" accorded special powers under Section 5 of the Fourteenth Amendment. *Id.* at 472, 477, 487.

In this case, by contrast, there is no claim that minority contractors in the Richmond area were discriminated against in the award of City contracts between 1978 and 1983. Rather, the City argues that the set-aside was justified in order to cure the effects of societal discrimination on minorities who were prevented from entering the contracting business altogether.

The difficulty with the City's argument is that a remedy that gives existing minority contractors a substantial preference in the award of government subcontracts is hardly "narrowly tailored" to remedy entry-level discrimination against minority construction workers. The City apparently contends that providing existing MBEs with a guaranteed portion of municipal business would indirectly encourage an increase in minority employment and the formation of minority enterprises.[4] This assumes that MBEs are more likely to hire and promote minority workers than are firms owned by whites. It also assumes that the barriers that have heretofore prevented the successful formation of a significant number of MBEs would dissolve if a guaranteed market were provided.

The mere hope that the set-aside might indirectly increase minority participation in the construction industry is too indirect a link between the set-aside and the governmental interest offered in its support to overcome the constitutional objections to the use of a racial preference. If the City is truly concerned with increasing minority access to entry-level construction jobs, there are a number of more direct approaches it could have employed. In addition to

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[4] In its brief on appeal, the City does not offer any justification for its selection of a thirty percent set-aside except to argue that this represents only a small fraction of constructing opportunities in the Richmond area. The fact that the thirty percent figure was selected arbitrarily or, as the Circuit Court said "simply emerged out of the mists," 822 F.2d at 1360, is, in and of itself, strong evidence that the plan is not properly tailored.

policing the hiring practices of City contractors, the City could require those contractors to conduct or to participate in apprenticeship programs geared to minorities and to institute recruiting programs in minority communities. In addition, the City could create seed capital or other programs designed to aid minorities and other disadvantaged workers in starting up new businesses. Programs such as these would directly help those who have been the victims of prior discrimination and would also create the base from which more minority contractors could rise.

As it stands now, the set-aside program not only fails to provide anything more than the hope of an indirect remedy to those who have been victimized by discrimination, it also confers a windfall on construction contractors who happen to be members of certain minority groups. These individuals are not identified victims of discrimination by the City in particular or by society in general. Nevertheless, the set-aside program grants them a very substantial preference in bidding on government subcontracts.

Assuming, as the City Council apparently did, that the percentage of minority contractors is comparable to the percentage of blacks in the major local contractor associations, MBEs constitute approximately 0.46 percent of the available subcontractors. Under the set-aside, these contractors are entitled to thirty percent of the dollar value of every prime contract let by the City. Assuming that the thirty percent rule is observed in every case, this means that an MBE in Richmond is sixty-five times as likely to receive a municipal subcontract as is a white contractor.[5]

The substantial nature of the preference in this case is important in looking at the final factor that this Court has traditionally consid-

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[5] The fact that the set-aside gives a preference to MBEs for thirty percent of the dollar value of the prime contract (rather than thirty percent of the work that is subcontracted) means that in any particular case MBEs may have an even greater advantage. For example, if a prime contractor subcontracts only thirty percent of the work, all of that work must go to an MBE. Similarly, if, as in the case at bar, the subcontract cannot be easily split and constitutes more than thirty percent of the value of the prime contract, the entire contract again must go to an MBE.

ered with respect to racial preferences—the effect of the set-aside on innocent contractors who are not members of the minority group preferred by the ordinance. While non-minority contractors were disadvantaged to a certain extent by the ten percent set-aside in *Fullilove*, the Court found that disadvantage to be too small and indirect to outweigh the remedial benefits of the plan. In this case, by contrast, there are no direct remedial benefits from the plan. Furthermore, the thirty percent set-aside in this case imposes a far greater burden on non-minority contractors in the Richmond area than did the temporary ten percent set-aside at issue in *Fullilove*. Under these circumstances, *Amicus* submits that the Fourth Circuit was correct in holding that the racial preference at issue here is unconstitutional.

CONCLUSION

The Richmond set-aside program exceeds the constitutional and legal boundaries set by this Court. Striking down the City's scheme would still leave ample room for appropriate remedial efforts. But to uphold it would foster racial preferences under which individual rights would disappear in favor of theoretical "fairness" to racial or ethnic groups. The notion that each racial group is entitled to its "share" of public jobs and contracts is fundamentally at odds with the concept of individual rights embodied in the Constitution. Moreover, endorsement of a concept of group rights is bound to increase the level of political polarization in our society, as politicians and voters divide along racial lines based on the perception that political patronage is the only way to ensure fairness in the governmental process. This is not the type of legacy this Court should leave. As Justice Harlan observed almost a century ago in dissent in *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896), "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted.

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